CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1944

No. 928

COMMISSIONER OF INTERNAL REVENUE,
PETITIONER

vs.

WILLIAM R. WEBSTER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 28, 1944
CERTIORARI GRANTED DECEMBER 4, 1944

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 629

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

WILLIAM H. WEMYSS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

	Original	Print
Record from The Tax Court of the United States	1	1
Docket entries	1	1
Petition	2	2
Exhibit A—Notice of deficiency	4	3
Answer	7	5
Motion for amendment to petition, granted July 1, 1943	8	6
Amendment to petition	10	7
Answer to amendment to petition	11	8
Findings of fact and opinion, Mellott, J	11	8
Decision	24	18
Statement of evidence	25	18
Caption and appearances	25	19
Opening statement on behalf of petitioner	26	19
Opening statement on behalf of respondent	27	20
Testimony of William H. Wemyss	28	21
Petitioner's exhibits:		
No. 1—Agreement between William H. Wemyss and Ellen Stokes More, May 24, 1939	35	26
No. 2—Indenture of trust, June 6, 1927	37	27
No. 3—Indenture of trust, June 15, 1929	52	38
No. 4—Letter, Girard Trust Co. to W. H. Wemyss, April 17, 1943	66	49
Petition for review	67	50

	Original	Print
Record from The Tax Court of the United States—Con.		
Notice of filing petition for review	68	50
Designation of contents of record	69	51
Clerk's certificate [omitted in printing]	70	52
Proceedings in U. S. C. C. A., Sixth Circuit	72	52
Argument and submission	72	52
Judgment	72	52
Opinion, Martin, J.	74	52
Clerk's certificate [omitted in printing]	81	58
Order allowing certiorari	82	58

1 Before United States Board of Tax Appeals

Docket No. 110419

WILLIAM H. WEMYSS, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances: For Taxpayer: Cecil Sims, Esq., James W. Allen, Esq. For Comm'r: Charles P. Bagley, Esq.

Docket entries

1942

Apr. 6—Petition received and filed. Taxpayer notified. Fee not paid.

Apr. 13—Copy of petition served on General Counsel.

Apr. 10—Fee paid—check.

June 2—Answer filed by General Counsel.

June 2—Request for hearing in Nashville, Tenn., filed by General Counsel.

June 5—Notice issued placing proceeding on Nashville, Tenn., calendar. Answer and request served.

1943

Feb. 18—Hearing set April 19, 1943—Nashville, Tennessee.

Apr. 20—Hearing had before Judge Mellott on the merits. Submitted. Appearance of James W. Allen. Pet's brief due 30 days. Respondent's brief due 30 days. Pet's reply brief due 15 days.

May 8—Transcript of hearing 4-20-43 filed.

May 19—Brief filed by taxpayer. 5-19-43 Copy served.

June 9—Memorandum brief filed by General Counsel. Served 6-10-43.

July 1—Motion for leave to file the attached amendment to petition, amendment lodged, filed by taxpayer.

July 1—Reply brief filed by taxpayer.

July 1—Motion for leave to file the attached amendment to petition—granted

July 1—Copy of reply brief served on General Counsel.

2 July 2—Copy of motion—amendment to petition served on General Counsel.

July 13—Answer to amendment to petition filed by General Counsel. 7-14-43 Copy served.

Oct. 14—Findings of fact and opinion rendered—Mellott, Judge, Div. 11. Decision will be entered for the respondent. 10-14-43 Copy served.

Oct. 14—Decision entered. Mellott, Judge, Div. 11.
Dec. 6—Petition for review by U. S. Circuit Court of Appeals, 6th Circuit, filed by taxpayer.
Dec. 6—Designation of contents of record filed by taxpayer.
Dec. 7—Notice of petition for review sent to J. P. Wenchel filed.
Dec. 8—Proof of service filed.

Before United States Board of Tax Appeals

Petition

(Filed April 6, 1942)

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated February 3, 1942, and as a basis for this proceeding alleges as follows:

1. Petitioner is a citizen of the United States of America and resides in the County of Davidson, State of Tennessee.

2. The notice of deficiency, a copy of which is attached hereto and marked Exhibit "A", was mailed to the taxpayer on February 3, 1942.

3. The taxes in controversy are gift taxes for the calendar years 1939 and 1940. No gift taxes were assessed against petitioner for the calendar year 1939 and the deficiency assessment for that year is $12,995.66. Petitioner was assessed with gift taxes for the calendar year 1940
3 in the sum of $1,657.44 and the deficiency assessment for that calendar year is $3,965.20.

4. The determination of taxes set forth in said notice of deficiency is based upon the following error:

The Commissioner erred in determining that the transfer on May 24, 1939, of 13,139 shares of the capital stock, common, of the General Shoe Corporation was a gift of an amount equal to the entire value of the stock transferred within the meaning of the Revenue Act of 1932 as modified by legislation enacted subsequent thereto.

5. The facts upon which petitioner relies as a basis for this petition are as follows:

The petitioner William H. Wemyss entered into a contract with Ellen Stokes More on or about May 24, 1939, in which the said Ellen Stokes More promised to marry the said William H. Wemyss on June 20, 1939, and petitioner agreed to transfer and deliver 13,139 shares of the common capital stock of the General Shoe Corporation to the said Ellen Stokes More to compensate her for the loss of certain monthly income under the terms of a trust being

administered by the Girard Trust Company of Philadelphia, Pennsylvania, and to maintain her during her lifetime in keeping with her station in life.

A copy of said agreement is filed herewith as Exhibit "B."

6. Wherefore the petitioner prays that the Board may hear this proceeding and may determine that the transfer on May 24, 1939, of 13,139 shares of the common capital stock of General Shoe Corporation was not taxable as a gift, and that the reported deficiency in the sum of $16,960.86 in gift tax liability for the calendar years 1939 and 1940 is erroneous, and that the notice thereof and the assessment of any tax thereon be set aside.

This the 3rd day of April 1942.

CECIL SIMS,
Attorney for Petitioner,
Cecil Sims,
1000 American Trust Building,
Nashville, Tennessee.

4 [*Duly sworn to by William H. Wemyss; jurat omitted in printing.*]

Exhibit A to petition

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

NASHVILLE, TENNESSEE

FEBRUARY 3, 1942

Office of Internal Revenue Agent in Charge, Nashville Division.

MT-ET-CT-318-39-40-Tennessee—Donor—William H. Wemyss

Mr. WILLIAM H. WEMYSS,
% Mr. Cecil Sims,
Attorney,
1000 American Trust Bldg., Nashville, Tennessee.

DEAR SIR: You are advised that the determination of the gift tax liability of the above-named donor, disclosed a deficiency of $16,960.86, as shown in the statement attached, for the calendar years 1939 and 1940.

In accordance with the provisions of existing internal-revenue laws, notice is hereby given of the deficiency mentioned.

5 Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United

States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Internal Revenue Agent in Charge, Nashville, Tennessee, for the attention of MT-90-D. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully.

GUY T. HELVERING,
Commissioner.

By (Signed) N. F. RICHARDSON,
Internal Revenue Agent.

Enclosures:
Statement.
Form or waiver.
CBB/VEH.
MT-ET-GT-318-39-40-Tennessee.
Donor—William H. Wemyss.
Calendar years 1939 and 1940.

STATEMENT

	Liability	Assessed	Deficiency
Gift Tax, Year 1939	$12,995.65		$12,995.65
Gift Tax, Year 1940	5,622.64	$1,657.44	3,965.20

The deficiency results from the following adjustments:

Calendar year 1939

Schedule A.

6 Gift to Ellen Stokes More: 13,139 shares common stock of General Shoe Corporation $149,456.13.

Exclusions, returned 0, determined $4,000.00.

In view of the foregoing, your Federal Gift Tax liability for the calendar year 1939 is finally determined as follows:

	Returned	Determined
Total gifts, 1939, other than charitable, public and similar gifts	0.00	$149,456.13
Less exclusions	0.00	4,000.00
Amount of gifts included	0.00	145,456.13
Less specific exemption	0.00	0.00
Net gifts, 1939	0.00	145,456.13
Tax on net gifts, 1939	0.00	12,995.65
Tax shown on return		0.00
Deficiency, 1939		12,995.65

It has been determined that the transfer on May 24, 1939, of 18,139 shares of the capital stock, common, of the General Shoe Corporation was not made for a consideration in money or money's worth, and that the said transfer constituted a gift of an amount equal to the entire value of the stock transferred.

Calendar year 1940

The deficiency results from the following adjustments:
MT-ET-GT-318-39-40-Tennessee
Donor—William H. Wemyss
Calendar years 1939 and 1940.

STATEMENT, CONTINUED

	Returned	Determined
Total gifts, 1940, other than charitable, public and similar gifts	$84,090.12	$84,090.12
7 Less exclusions	4,000.00	4,000.00
Amount of gifts included	80,090.12	80,090.12
Less specific exemption	40,000.00	40,000.00
Net gifts, 1940	40,090.12	40,090.12
Net gifts for preceding years	0.00	145,456.13
Total net gifts	40,090.12	185,546.25
Tax on total net gifts	1,506.76	18,107.15
Tax on net gifts for preceding years	0.00	12,995.66
Tax on net gifts, 1940, without addition of defense tax	1,506.76	5,111.49
Defense tax	150.68	511.15
Total tax payable, 1940	1,657.44	5,622.64
Tax shown on return		1,657.44
Deficiency, 1940		3,965.20

The deficiency for 1940 results from the determination that the amount of net gifts for preceding years is $145,456.13, rather than none, as shown in your return.

Accordingly, your Federal Gift Tax liability for the calendar year 1940 is finally determined as shown above.

Before United States Board of Tax Appeals

Answer

Filed June 2, 1942

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed in this proceeding, admits and denies as follows:

8 1, 2, and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

4. Denies that the Commissioner erred as alleged in paragraph 4 of the petition.

5. Denies the allegations contained in paragraph 5 of the petition.

Denies generally and specifically each and every material allegation not hereinbefore admitted or denied.

Wherefore, it is prayed that the petitioner's appeal be denied and that the Commissioner's determination be affirmed.

(Signed) J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:
FRANK M. THOMPSON, Jr.,
Division Counsel,
JOHN R. STIVERS,
Special Attorney,
Bureau of Internal Revenue.

JRS/vhk.
5/28/42.

In the Tax Court of the United States

[Title omitted.]

Motion for amendment to petition

Filed July 1, 1943, Granted July 1, 1943

Comes petitioner, William H. Wemyss, and moves the Court, pursuant to Rule 17, for leave to amend his petition by adding thereto the following additional Assignment of Error:

If Sections 501 and 503 of the Revenue Act of 1932 are construed to be applicable to the transfer upon which the deficiency
9 assessments were made, then said Sections 501 and 503 of said Revenue Act of 1932 will be wholly arbitrary and as so construed will violate the Fifth Amendment to the Constitution of the United States.

Petitioner avers that this amendment, if allowed, raises only a question of law and does not change or affect the contentions of the respective parties relating to the proof or the facts.

The question of law raised by the foregoing amendment was stated in the record by petitioner's counsel as one of its contentions (R., pp. 3–4), and no question was made by respondent as to petitioner's right to rely upon such insistence.

This application for amendment is made at this time because respondent did not question petitioner's right to make this insistence at the hearing although being fully advised that such was one of the insistences which petitioner would make, but raised this question for the first time in his memorandum reply brief.

Since petitioner does not question the substantive validity of the sections in question but only questions their validity in the event the Tax Court should construe these sections in accordance with his contentions and since these contentions are made for the first time in the respondent's reply brief, petitioner, out of the abundance of precaution, now moves for amendment accordingly.

Respectfully submitted,

J. W. ALLEN,
Third National Bank Bldg., Nashville, Tennessee.
CECIL SIMS,
1000 American Trust Bldg., Nashville, 3, Tennessee,
Attorneys for Petitioner.

10 STATE OF TENNESSEE,
County of Davidson.

Cecil Sims makes oath that he is one of the attorneys for petitioner, and that the foregoing motion for amendment is not made for the purpose of delay but in good faith and solely for the purpose of meeting a technical objection not relied on by the respondent at the hearing.

CECIL SIMS.

Sworn to and subscribed before me, this 29th day of June 1943.
[SEAL] MARY E. WOODALL,
Notary Public.

My Commission expires: Jan. 15, 1946.

In the Tax Court of the United States

[Title omitted.]

Amendment to petition

Lodged July 1, 1943

By leave of Court the petition in this cause is amended by adding thereto the following Assignment of Error:

If Sections 501 and 503 of the Revenue Act of 1932 are construed to be applicable to the transfer upon which the deficiency assessments were made, then said Sections 501 and 503 of said Revenue Act of 1932 will be wholly arbitrary and as so construed will violate the Fifth Amendment to the Constitution of the United States.

J. W. ALLEN,
Third National Bank Bldg., Nashville, Tennessee,
CECIL SIMS,
1000 American Trust Bldg., Nashville, 3, Tennessee,
Attorneys for Petitioner.

11 In the Tax Court of the United States

Answer to amendment to petition

Filed July 13, 1943

Comes now the respondent, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the amendment to the petition filed in this proceeding, denies the assignment of error contained therein.

Denies generally and specifically each and every material allegation not hereinbefore admitted or denied.

Wherefore, it is prayed that the appeal be denied.

(Signed) J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:
FRANK M. THOMPSON, Jr.,
Division Counsel,
CHARLES P. BAGLEY,
Special Attorney,
Bureau of Internal Revenue.

2 T. C. No. 111.

In the Tax Court of the United States

WILLIAM H. WEMYSS, PETITIONER, *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 110419

Findings of fact and opinion

Promulgated October 14, 1943

Pursuant to antenuptial agreement between petitioner and his intended wife, he transferred to her 13,139 shares of stock in consideration for her promise to marry him, and to compensate her for the loss of income under two trusts created by her former husband. Held:

1. The transfer was made for less than an adequate and
12 full consideration in money or money's worth and was subject to gift tax under section 503 of Revenue Act of 1932.

2. Marriage, as a consideration, is not measurable in money or money's worth and the amount taxable as a gift is the value of the property transferred.

3. Section 503, as construed, does not violate guaranty of due process of law under the Fifth Amendment to the Constitution.

4. The amount of the taxable gift may not be reduced by the value of the wife's interest in two trusts, lost by her upon her marriage to petitioner.

Cecil Sims, Esq., and James W. Allen, C. P. A., for the petitioner.

Charles P. Bagley, Esq., for the respondent.

Respondent determined deficiencies in gift tax in the amount of $12,995.66 for the calendar year 1939 and $3,965.20 for 1940. The issue is whether the transfer on May 24, 1939, by petitioner to his prospective bride of 13,139 shares of common stock of General Shoe Corporation, having a value of $149,456.13, constituted a taxable gift.

Findings of fact

Petitioner is a resident of Davidson County, Tennessee. On January 1, 1919, he married Helen Peters. She died on April 1, 1934, leaving two children surviving. On June 20, 1939, petitioner married Ellen Stokes More, a widow.

The former husband of petitioner's second wife, E. L. More, died on February 9, 1934, leaving one son surviving. Prior to his death, E. L. More executed two trust indentures, one on June 6, 1927, and one on June 15, 1929, naming the Nashville Trust Company as trustee. The corpus of the first trust was 650 shares of the capital stock of The Arcade Company, Nashville, Tennessee, and the corpus of the second trust was 20 shares of the capital stock of the same company. Each trust instrument pro-
13 vided that the entire net income of the trust estate should be paid to the grantor's widow during her lifetime or until her remarriage to be used for the maintenance and support of her and her son.

Ellen Stokes More was forty-four years of age on February 9, 1939. The amounts received by her from the trustee or successor trustee of the trusts referred to above from the date of the death of her husband until June 20, 1939 (the date of her marriage to petitioner) were as follows:

	June 6, 1927 trust	June 15, 1929 trust
1934 from February 9th	$9,222.45	$283.81
1935	11,934.14	337.25
1936	9,411.50	289.75
1937	9,253.32	285.00
1938	11,211.92	342.00
1939 to June 20th	6,972.10	214.54
	57,105.43	1,752.35

The trust instruments were construed to constitute separate and independent trusts for the grantor's widow and son. One-half of the above amount, or $29,428.89 was accordingly treated as received by the widow for her own use and an equal amount for the benefit of her child.

Some time prior to May 24, 1939, petitioner made a proposal of marriage to Ellen Stokes More. She told him she would not be willing to marry him and lose her life income under the trusts created by her first husband unless he would enter into a premarriage contract with her to make good the loss. On May 24, 1939, they entered into the following agreement:

This contract and agreement entered into by and between William H. Wemyss and Ellen Stokes More, both residents of Davidson County, Tennessee:

14 Witnesseth that:

Whereas, the said Ellen Stokes More has promised to marry William H. Wemyss on June 20, 1939; and,

Whereas, upon the consummation of said marriage, under the terms of a trust now being administered by the Girard Trust Company of Philadelphia, Pennsylvania, the said Ellen Stokes More will be deprived of a large monthly income; and

Whereas, it is the desire and intention of the said William H. Wemyss to compensate said Ellen Stokes More for her aforesaid loss and to provide for and maintain her so long as she may live in keeping with her station in life; and

Now, therefore, I William H. Wemyss, have this day transferred in blank and delivered to the said Ellen Stokes More thirteen thousand one hundred and thirty nine (13,139) shares of the common capital stock of the General Shoe Corporation evidenced by the following certificates:

Certificate No.	No. shares
6,001	472
6,495	231
844	900
840	1,000
839	1,000
837	9,536

In testimony whereof we, William H. Wemyss and Ellen Stokes More, have hereunto affixed our signatures.

This May 24th, 1939.

(Signed) William H. Wemyss.
(Signed) Ellen Stokes More.

This contract was recorded on June 21, 1939, in the Registrar's Office of Davidson County, Tennessee.

15 Petitioner transferred the 13,139 shares of General Shoe Corporation stock to Ellen Stokes More on May 24, 1939. Upon their marriage on June 20, 1939, the income she had been receiving for her own use under the trusts created by her first husband ceased and thereafter all of the income was paid to or for the benefit of her only child by her first husband. On the same date and immediately following the marriage petitioner executed a will, providing therein that his wife should have an estate for life or widowhood in a certain farm, and that one-third of his estate, less the value of 11,139 shares of common stock of General Shoe Corporation, should be held in trust for her.

Respondent determined that the transfer on May 24, 1939, of the 13,139 shares of General Shoe Corporation common stock was not made for a consideration in money or money's worth, and that the transfer constituted a gift of an amount equal to the value of the stock. He determined this value to be $149,456.13.

Opinion

MELLOTT, Judge: The sole issue is whether the transfer of the stock, the value of which is not controverted, constituted a taxable gift. The applicable provisions of the statute are shown in the margin.[1]

The parties agree that the transfer was made in consideration of the promise of marriage by petitioner's prospective wife and, as stated in the contract, to compensate her for the loss of income which she had been receiving under the trusts created by her first husband as well as "to provide for and maintain her for so

16 long as she may live in keeping with her station in life."

We agree with petitioner's contention that the agreement to marry constituted valuable consideration for the transfer, Prewit v. Wilson, 103 U. S. 22; Barnum v. Le Master, 110 Tenn. 638, 75 S. W. 1045; hence no taxable gift was made if only section 501 (a), supra, be considered. We pass at once, therefore, to the other contentions of the parties.

Section 503, supra, provides that where property is transferred for less than an adequate and full consideration in money or money's worth the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the

[1] SEC. 501. IMPOSITION OF TAX.
(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident, or nonresident, of property by gift.
SEC. 503. TRANSFER FOR LESS THAN ADEQUATE AND FULL CONSIDERATION.
Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this title, be deemed a gift, and shall be included in computing the amounts of gifts made during the calendar year.

tax imposed by the title, be deemed a gift and be included in computing the amount of gifts made during the year.[2] Respondent has construed the section as authorizing the inclusion of the entire value of property transferred for "a consideration not reducible to a money value, as love and affection, promise of marriage, etc."[3]

Petitioner contends that respondent's interpretation is erroneous. He argues that section 501 imposes an excise only upon the transfer of property by gift; that section 503 is applicable only where property is transferred for a monetary consideration less than its actual value or is exchanged for property of less value; that the latter section is subordinate to the former and is to be applied only where there is a plain attempt at evasion through
17 making a purported sale of property for less than its actual value; and that if section 503 be construed as taxing bona fide transfers for a valuable consideration it would be "contrary to the actualities * * *, unreasonably oppressive * * *, would arbitrarily ignore recognized rights to enjoy and convey individual property for a valuable and adequate consideration, and * * * violate the guaranty of due process of law * * *." Finally and in the alternative he urges that even if the promise of marriage be wholly disregarded there was nevertheless an adequate and full consideration in money or money's worth for the transfer in the legal detriment which the wife agreed to suffer in surrendering an annuity valued at $77,500. Therefore, he says, the gift made by him could not exceed the difference between that amount and the value of the stock, or $71,956.13.[3]

We are not persuaded that respondent has erred in his interpretation of section 503. The legislative history [4] indicates that Congress was endeavoring "to state with brevity and in general terms the provisions of a substantive character." Referring to some of the terms used—property, transfer, gift, etc.—it is said that

---

[2] Articles 1 and 8 of Regulation 79 provide:

ART. 1.

* * * The tax is not limited in its imposition to transfers of property without a valuable consideration, which at common law are treated as gifts, but extends to sales and exchanges for less than an adequate and full consideration in money or money's worth (see Article 8) * * *

ART. 8.

Transfers reached by the statute are not confined to those only which, being without a valuable consideration, accord with the common law concept of gifts but embrace as well sales, exchange, and other dispositions of property for a consideration in money or money's worth to the extent that the value of the property transferred by the donor exceeds the value of the consideration given therefor. * * * A consideration not reducible to a money value, as love and affection, promise of marriage, etc., is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gifts.

[3] The only evidence touching upon this phase is the wife's age—44 years—at the time of her marriage to petitioner and the income of the trusts. The $77,500, used by petitioner as the value of the right of Ellen Stokes More to receive for life one-half of the income of the trusts created by her first husband, is the result of a calculation under a table set out in respondent's regulations for the value of annuities. In making the calculation petitioner used the average annual income ($5,484) received by Mrs. More under the trust prior to her marriage to him.

[4] Senate report No. 665, 72d Cong., 1st Sess.; House Report No. 708, 72d Cong., 1st Sess.

they "are used in the broadest and most comprehensive sense." Cf. Robinette v. Helvering, 318 U. S. 184, and Smith v. Shaughnessy, 318 U. S. 176. There is nothing to indicate that Congress intended to make section 503 subordinate to section 501 or that it should be limited to instances where property is "sold or exchanged" for less than an adequate and full consideration in money or money's-worth as urged by petitioner. The fact that such words had been used in an earlier act (section 320, Revenue Act
18 of 1924) is unimportant. In our judgment Congress deliberately and intentionally chose to include, within the category of property to be taxed, not only that passing by a transfer which constituted a gift at common law but also all which was tranferred for less than an adequate and full consideration in money or money's worth. In other words, section 503 is supplementary to section 501. The conclusion which we have reached is supported not only the language of the act and the legislative history but also by the regulations which have been in effect without change for many years. (Articles 1 and 8, Regulations 79, supra. Cf. Articles 1 and 8, 1936 Edition approved February 26, 1936.) "Treasury Regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received Congressional approval and have the effect of law." Helvering v. Winmill, 305 U. S. 79; Waft v. Commissioner, 304 U. S. 351.

The only consideration received by petitioner for the transfer of the stock was the promise of marriage. While it, as pointed out above, is a valuable consideration it is not measurable in "money or money's worth." Prewit v. Wilson, supra. Cf. Central Union Trust Co., of New York et al., Executors, 24 B. T. A. 296. It is obvious, therefore, that "the amount by which the value of the property [transferred] exceeded the value of the consideration" equalled precisely the value of the property transferred. While the regulation states that a consideration not reducible to money value "is to be wholly disregarded" that is merely giving recognition to the fact that an attempt to make the calculation specified in the act would be nugatory.

The parties discuss at some length Commissioner v. Bristol, 121 Fed. (2d) 129, reversing Bennet B. Bristol, 42 B. T. A. 263. The issue in that case was whether certain properties and annuities transferred by petitioner to his wife upon marriage were gifts subject to tax. We concluded that Congress did not intend the interpretative restriction placed around the estate tax—(the amendment made by section 804 of the Revenue Act of 1932 to the estate tax law being declaratory of the law as it was prior thereto)
19 to apply to the gift tax law and that the relinquishment of

dower or other marital rights might, under the gift statute, be adequate and full consideration in money or money's worth. We pointed out that an arithmetical comparison of the value of the rights given up by the wife—relinquishment of her statutory rights in her husband's estate—with the value of the property received by her demonstrated that the transfer was full and adequate in money or money's worth. We have subsequently expressed our belief that the basic principle upon which decision was reached is sound (Herbert Jones, 1 T. C. 1207, 1209) and the District Court for the Southern District of Florida recently chose to follow it "rather than the contrary view set forth" in the opinion of the Circuit Court. Merrill v. Fahs, — Fed. Supp. —, (June 24, 1943, 43-2 U. S. T. C. 10061). But an attempt to apply it here could not aid petitioner; for no property or property rights of his prospective wife, vested, contingent or inchoate, were transferred by her to him. All that he received was her promise to marry him.

Petitioner's argument in support of his intention that the interpretation placed upon section 503 by the Treasury Department renders it unconstitutional is based largely on Helvering v. City Bank Farmers Trust Co., 296 U. S. 85. In that case the taxpayer urged that section 302 (d) of the Revenue Act of 1926 was unconstitutional, it providing that there should be included in the gross estate of a decedent the value at the time of his death of property transferred prior to death where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any other person, to alter, amend, or revoke the transfer. The court denied the contention, saying inter alia:

"* * * Congress may adopt a measure reasonably calculated to prevent avoidance of a tax. The test of validity in respect of due process of law is whether the means adopted are appropriate to the end. A legislative declaration that a status of the taxpayer's creation shall, in the application of the tax, be deemed the equivalent of another status falling normally within the scope of the taxing power, if reasonably requisite to prevent evasion, does not take property without due process. But if the means are unnecessary or inappropriate to the proposed end, are unreasonably harsh or oppressive, when viewed in the light of the expected benefit, or arbitrarily ignore recognized rights to enjoy or to convey individual property, the guarantee of due process is infringed."

Petitioner concedes that Congress has the power to classify, as taxable gifts, colorable transactions intended to evade the gift tax. He insists, however, that it may not tax a bona fide transfer for a valuable consideration, pointing out it is elementary the power to prevent evasions is to be reasonably exercised. The

premise is sound but the conclusion is nevertheless erroneous. The taxation as a gift of the transfer by a wealthy man of a substantial portion of his property to his intended spouse is, in our judgment, a reasonable exercise of the power to prevent evasions. Normally property so transferred will not be included in his gross estate in the absence of some affirmative act by the wife. Unless the tax is imposed when the transfer is made the excise upon the transfer will be altogether escaped. The gift tax and the estate tax are in pari materia and "an important, if not the main purpose of the gift tax was to prevent or compensate for avoidance of death taxes by taxing the gifts of property inter vivos which, but for the gifts, would be subject in its original or converted form to the tax laid upon transfers at death." Estate of Sanford v. Commissioner, 308 U. S. 39. It is reasonable to assume that Congress was aware of the fact that a transfer in consideration of marriage would not be a true gift since it would be based upon a valuable consideration. The fact that it chose language appropriate, under the Supreme Court decisions, to subject such a transfer to tax indicates that it was familiar with the court's interpretation and that it deliberately adopted the language for the purpose of closing the door against this method of escaping tax upon a transfer of property. In
21 this view it is immaterial that the transfer, as here, may not have been animated by a tax-saving motive. We believe that the regulations correctly interpret the law and that section 503 as thus construed does not violate the guaranty of due process of law under the Fifth Amendment to the Constitution.

Petitioner's alternative contention is that if section 503 be construed as applicable to the transfer made by him then the taxable gift must be limited to the excess of the value of the stock over the value of the interest in the income of the two trusts which his wife lost by reason of and upon her marriage to him.

Even if it be assumed that the loss by his wife of the income of the trusts was a consideration for the transfer of the stock rather than a mere consequence of the marriage, petitioner's contention must fail because he did not receive the income of the trusts or acquire any right thereto. All that he received was a promise of marriage which, as heretofore pointed out, is not measurable in money or money's worth. But he cannot prevail on this ground for other reasons. If it should be held that the taxable gift is to be computed as he suggests then he should have proved the actual value of the wife's interest under the trusts. Cf. John D. Archbold, 42 B. T. A. 453. The fact that the average income received by her during the period of her widowhood was at the approximate rate of $5,484 per annum is no assurance that the in-

come would thereafter continue at the same rate. Neither trust instrument gave her an annuity for life Each merely provided that she should have an aliquot part of the income, whatever it was. The corpus of each trust consisted of capital stock of the Arcade Company of Nashville, Tennessee. No evidence as to the financial condition of the company or of the assets owned by it was adduced.

Petitioner's argument that the "detriment" suffered by his wife was consideration for the transfer even though it did not result in any financial gain to him loses much of its force when it is kept in mind that the income, which she would have received under the trusts, inured wholly to her infant son. It may well be, though we make no holding to that effect, that her maternal in-
22 stinct prompted her to take the step which would give him double assurance of an adequate income for life.

Respondent in our judgment committed no error in determining the deficiencies in tax.

Reviewed by the Court.

Decision will be entered for the respondent.

Dissenting opinion

DISNEY, J., dissenting: Although perhaps, on the ground of failure of consideration, the ultimate conclusion of the majority opinion may be correct, the opinion is in large part based upon a concept to which I can not subscribe, that is, that section 503 of the Revenue Act of 1932 uses the word "consideration" as meaning consideration only to the donor, and may not be applied if the consideration consists only of detriment suffered by the donee. Neither in that section, nor elsewhere in the Revenue Act do I find the word "consideration" defined. I conclude, therefore, we should apply that meaning which has developed through centuries of experience in the civil and common law. That meaning, beyond controversy, includes detriment suffered by the promisee. Corpus Juris Secundum on Contracts, p. 425. It is true that Commissioner v. Bristol, 121 Fed. 129, contains language to the effect that section 503 provides that the transferor must receive consideration. The statute, however, does not so provide, but requires only that property be "transferred for less than adequate and full consideration," and if not, that the excess be deemed a gift. Property was transferred in this case for a consideration. Reasonable and realistic construction of the contract indicates clearly, I think, that the wife-to-be agreed to do two things, to wit, to marry petitioner and to forego her rights under a trust. The findings of fact recite that she told the petitioner that she would not marry him and lose her life income under the trust, unless he would enter into a pre-marriage contract with her to make good her loss.

In truth, the making good of the loss appears the principal element of the written agreement entered into. It was upon the representation and understanding that marriage would entail
23 such loss to his intended wife that the petitioner agreed to, and did, make the transfer; and if this representation had proved unfounded and she had in fact continued to receive, as before, the income under the trust, there would, in my opinion, have been partial failure of consideration for petitioner's transfer. Of course, the fact that it may not have represented full and adequate consideration goes only to the amount to be deemed gift. To the wife-to-be the detriment was consideration "in money or money's worth." The only point, then, is whether the consideration may be only to the promisee.

The Congressional Committee Reports covering section 503 of the Revenue Act of 1932, the same in both House and Senate, say that, "the tax is designed to reach all transfers to the extent that they are donative" and therefore that where the transfer is made for less than adequate and full consideration, the excess in value of property transferred over such consideration shall be deemed a gift. Patently, the object of the statute is to tax only so much of a transfer as is donative. This requires application of the usual concepts of gift and therefore of consideration. In my view, the language of section 510 of the same Revenue Act bears out this idea; for that section provides that the donee is personally liable for the gift tax, if not paid when due to the extent of the value of the gift. The majority opinion, therefore, subjects the petitioner's wife to the entire gift tax upon something for which she gave a very real consideration in money or money's worth, to some apparently considerable degree; for though the majority opinion holds that in any event the value of her interest in the trust was not proven, and obviously it was not fully proven, nevertheless, clearly it appears that it had no small monetary value. An interest in a trust which had for the last six years produced about $5,000 per year can hardly be denominated without money's worth. I find no reason, either in the words of the statute
24 or in the requirement of the situation sought to be covered by the statute, to desert the long respected concept of "consideration." Why not take the law as we find it? The statute, in my opinion, fairly and reasonably requires the application thereof and negatives intent to tax that portion of a transfer which as between the parties is covered by consideration in its usual and ordinary legal sense.

In the above nothing is said as to whether an agreement to marry is a consideration measurable in money, for the reason that the agreement to marry was only one of the considerations entering into the contract, and therefore it appears immaterial as to

whether marriage as consideration was pecuniarily measurable. The above conclusions, therefore, are based only upon the financial detriment suffered by the wife-to-be, as a consideration which in my opinion the law requires us to take into account. I therefore respectfully dissent.

[SEAL]

In the Tax Court of the United States

WILLIAM H. WEMYSS, PETITIONER *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 110419

Decision

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, promulgated October 14, 1943, it is

Ordered and decided: That there are deficiencies in gift tax of $12,995.66 and $3,965.20 for the calendar years 1939 and 1940, respectively.

Enter:

(S) ARTHUR J. MELLOTT, *Judge*.

Entered Oct. 14, 1943.

25 In the Tax Court of the United States

WILLIAM H. WEMYSS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket 110419

Statement of evidence

Filed May 8, 1943

Hearing at United States Court Room, United States Court House, Nashville, Tennessee, on the 20th Day of April 1943, at 3:00 O'Clock P. M.

REPORTER'S MINUTES

The above-entitled proceeding came on for hearing on this 20th day of April 1943, before the Honorable A. J. Mellott, Judge of the Tax Court of the United States, pursuant to notice of hearing heretofore given, whereupon the following proceedings were had, to wit:

Appearances

Cecil Sims (1000 American Trust Bldg., Nashville, Tenn.), and James W. Allen (1018 Third National Bank Bldg., Nashville, Tenn.), appearing for Petitioner.

Charles P. Bagley (Frank Nelson Bldg., Birmingham, Ala.), (Honorable J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue), appearing on behalf of the Commissioner of Internal Revenue, Respondent.

PROCEEDINGS

Judge MELLOTT. William H. Wemyss, Docket 110419. State your appearance, please.

Mr. SIMS. For the Petitioner, Cecil Sims, 1000 American Trust Building, Nashville, Tennessee.

Mr. ALLEN. Also for the Petitioner, James W. Allen, 1018 Third National Bank Building, Nashville, Tennessee.

Mr. BAGLEY. Charles P. Bagley, for the Respondent.

26 Judge MELLOTT. I believe that Mr. Sims is the only one that has filed an appearance in the case.

Mr. SIMS. That may be true.

Judge MELLOTT. You are admitted to practice, are you, Mr. Allen?

Mr. ALLEN. Yes, sir.

Judge MELLOTT. You may state the case for the Petitioner.

Mr. SIMS. You mean a summary of our position?

Judge MELLOTT. That is right.

Opening statement of Cecil Sims, attorney for petitioner

Mr. SIMS. Your Honor please, this case involves a deficiency gift tax which grows out of a certain contract between the Petitioner, Mr. Wemyss and Ellen Stokes More, which was a marriage contract under which the Petitioner contends thirteen thousand and some odd shares of common stock of the General Shoe Corporation, which were owned by the Petitioner, were transferred to Ellen Stoke More as a condition preceding, or in consideration of her agreement of marriage, the transfer taking place on May 24, 1939, pursuant to a written contract, which will be offered in evidence, the marriage thereafter being consummated on June 20, 1939.

It is the Petitioner's contention, first, that the transaction was not a transfer in the nature of a gift, but a transfer pursuant to a legal obligation under a written contract made in consideration of marriage, and that as a part of the transaction Ellen Stokes More, the other party to the contract, gave up a life income under two certain trusts created by her previous husband, E. L. More,

of which the Girard Trust Company, in Philadelphia, Pennsylvania, was the trustee; these trust instruments providing, in substance, that in the event of her remarriage her interest in the trust funds and the income therefrom would cease.

At the time of the marriage Ellen Stokes More was 44
27 years of age. The income accruing to her personally under the trust was averaging and had averaged for a number of years $450 per month.

The Petitioner will make two insistencies first, that the statute under which the gift tax is levied is an excise tax which is levied upon a substantive transaction known as a gift; that the section required denominating any transfer as a gift where the consideration received is not equal in money or money value, and requiring taxation as a gift to the extent of any difference is a statute which is wholly inequitable to a transaction of this nature and was intended to be confined only to an exchange of property where both parties were dealing in a business transaction, and there was a difference in the valuation of the properties.

It will also be contended that Congress has no constitutional power to bring within the classification of a gift any transaction except one of such a nature that it might be reasonably termed to be an evasion of the statute; that Congress cannot constitutionally declare a transaction as a gift unless it be in substance and in fact a gift, its power being limited to classifying transactions as gifts within the realm of the evasion periphery that extends around every substantive statute.

It will also be the Petitioner's position, somewhat in the alternative, that if the section relied on by the Government be applicable, then to the extent that Mrs. More gave up a life interest in a trust fund capitalized under the mortality tables applicable to a person of her age, under regulations 29 of the U. S. Treasury Department relating to the gift tax, and in particular Table A, the money or money value of the transfer is measurable by that sum, which would be approximately $84,000 as compared to an admitted value of some $149,000, which was the money value of the stock transferred.

Judge MELLOTT. State the case for the Respondent.

Opening statement by Mr. Bagley, Attorney for respondent

Mr. BAGLEY. The Respondent contends this was a gift within the meaning of Sections 501 and 503 of the Revenue
28 Act of 1932, and that the only consideration flowing to the Petitioner for this transfer was a promise of marriage which he received from Mrs. More; in other words, all he gained

was a wife, and since that consideration is one which is not reduceable to money, the money's worth of the entire value of the stock transferred constitutes a taxable gift.

Judge MELLOTT. Call your witness, please.

Whereupon WILLIAM HATCH WEMYSS, the Petitioner, was called as a witness in his own behalf, and having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. SIMS:

Q. What is your name?—A. William Hatch Wemyss.

Q. You are the Petitioner in the present case?—A. Yes, sir.

Q. Where do you reside?—A. In Sumner County, Tennessee.

Q. How old are you?—A. 63.

Q. Will you state the date of your first marriage?—A. January 1, 1919.

Q. To whom were you married?—A. Helen Peters.

Q. Will you state when your first wife died?—A. April 1, 1934.

Q. How many children survived upon the death of your first wife?—A. Two children.

Q. Their names, please, and present ages?—A. Helen Margaret Wemyss, 19; William H. Wemyss, Jr., 17.

Q. When were you married to Ellen Stokes More?—A. June 20, 1939.

Q. Had she been previously married?—A. Yes, sir.

Q. To whom had she been previously married?—A. E. L. More.

Q. When did she marry Livingfield More?—A. June 9, 1925.

29 When did Mr. Livingfield More die?—A. February 9, 1934.

Q. How many children, if any, survived that marriage?—A. One son.

Q. His name?—A. Livingfield More, Jr.

Q. His age at the present time?—A. Sixteen.

Q. I will ask you to state whether or not you entered into any agreement with Ellen Stokes More, the widow of E. L. More, deceased, prior to her consent to marry you?—A. I did.

Q. If so, will you please state the circumstances leading up to the agreement and the agreement itself?—A. She told me she would not be willing to marry me and lose her life income unless I gave her a premarriage contract and made it good.

Q. State whether or not she required as a condition to her consent to marriage to you a written obligation on your part to transfer to her sufficient securities, the income from which would make up the loss which she would sustain as a result of her marriage.

Mr. BAGLEY. I think that the question is a little leading.

Judge MELLOTT. Yes; it is a little leading.

Mr. SIMS. I was assuming there was really no dispute, but I reframe it.

Judge MELLOTT. Very well.

Mr. SIMS. Please read the last question and answer.

(Question and answer read.)

By Mr. SIMS:

Q. Did she require that as a condition precedent to her consent to marriage?—A. Yes, sir.

Q. Did you enter into a contract with her pursuant to that condition?—A. I did.

Q. State whether or not you agreed with her as to what securities were to be transferred?—A. Yes.

Q. What were they?—A. There were so many shares of General Shoe stock, common; 13,000 and some odd shares.

30 Q. State whether or not Mrs More, in addition to the written contract required the contract to be carried out by the actual transfer of the stock before the marriage took place?—A. Yes.

Q. What was the profession of Mrs. More's father?—A. A lawyer.

Q. Was the agreement which you have testified concerning prepared by Mr. Stokes, Mrs. More's father?—A. Yes, sir.

Q. And reduced to writing?—A. Yes, sir.

Q. Can you identify the document I hand you as a true copy of that agreement?—A. Yes.

Mr. SIMS. We offer the document for identification.

Judge MELLOTT. Is there any objection?

Mr. BAGLEY. No objection.

Judge MELLOTT. It will be received and marked for identification "Petitioner's Exhibit No. 1."

(Written agreement referred to, marked "Petitioner's Exhibit No. 1" and received in evidence.)

Mr. SIMS. That puts it in evidence?

Judge MELLOTT. That is right.

By Mr. SIMS:

Q. Before I forget it, Mr. Wemyss, how old was Ellen Stokes More at the time of her marriage to you?—A. 44.

Q. When was her forty fourth birthday?—A. On February 9, that year; 1939.

Q. Referring to Petitioner's Exhibit No. 1, the contract, state on what date the contract was executed by you and Mrs. More?—A. May 24, 1939.

Q. Where was it executed?—A. In her father's office.

Q. In the City of Nashville?—A. Yes, sir.

Q. That is his law office?—A. Yes, sir.

Q. Was it acknowledged before a Notary Public?—A. Yes, sir.

Q. After being acknowledged, state whether or not it was registered?—A. It was.

31 Q. In the register's office of Davidson County, Tennessee?—A. Yes, sir.

Q. The county in which Nashville is located?—A. Yes, sir.

Q. Mr. Wemyss, I will ask you if you can identify the document which I hand you as a certified photostatic copy of a certain trust indenture, dated June 6, 1927, between E. L. More, of River Falls, Alabama, and the Nashville Trust Company?—A. I can.

Q. Can you identify the document I hand you dated June 15, 1929, between E. L. More, of River Falls, Alabama, and the Nashville Trust Company?—A. Yes, sir.

Q. Can you state whether or not they constitute true copies, duly certified, of the two trust indentures, executed by E. L. More, the first husband of Ellen Stokes More, and the Nashville Trust Company, creating certain trusts, as set out in the instruments?—A. They do.

Q. Will you further state whether or not the Nashville Trust Company was subsequently succeeded by the Girard Trust Company of Philadelphia, Pennsylvania?—A. Yes, sir.

Mr. SIMS. We offer the two documents in evidence.

Mr. BAGLEY. No objection.

Judge MELLOTT. They may be handed to the clerk and marked "Petitioner's Exhibits Nos. 2 and 3" and received in evidence.

(Trust indentures, dated June 6, 1927, and June 15, 1929, between E. L. More of River Falls, Alabama, and the Nashville Trust Company, referred to, marked "Petitioner's Exhibits 2 and 3," and received in evidence.)

Mr. SIMS. I might say for the benefit of the record, Petitioner's Exhibit No. 2 creates a trust consisting of 650 shares of corporate stock known as the Arcade Company. The second trust indenture, to wit, Petitioner's Exhibit No. 3, is an identical trust that adds to the first trust 20 additional shares of the same stock. I say they are identical, because insofar as material to this controversy, the sections are identical as I have compared them.

32 There may be some differences not material to this controversy.

By Mr. SIMS:

Q. Now, for the benefit of the record, will you state whether or not under the terms of those two trust identures—of course, they speak for themselves, but to make the record coherent, Ellen Stokes More upon the death of her first husband was entitled to

receive during her lifetime or until her remarriage one half of the net income accruing under the trust estate?—A. She was.

Q. Mr. Wemyss, I will ask you if you have procured and have before you a complete statement from the Girard Trust Company?—A. Yes, sir.

Q. Showing the total funds distributed under the two trusts which have been made Petitioner's Exhibits 2 and 3?—A. Yes, sir.

Q. From February 9, 1934, through June 20, 1939, the first date being the date of the death of Mr. E. L. More, the last date being the date of the marriage of Ellen Stokes More to you?—A. Yes, sir.

Q. I will ask you if the income is divided first with respect to Petitioner's Exhibit No. 2, and second, with respect to Petitioner's Exhibit No. 3?—A. Yes, sir.

Q. Now, the total income shown on the document I am handing you, I believe, represents the total disbursements, and only one-half of that amount accrued to Ellen Stokes More; is that correct?—A. Yes, sir.

Mr. SIMS. I offer the document in evidence as Petitioner's Exhibit No. 4.

Judge MELLOTT. Is there any objection?

Mr. BAGLEY. No objection.

Judge MELLOTT. It may be received and marked "Petitioner's Exhibit No. 4."

(Statement from Girard Trust Company, Philadelphia, Pennsylvania, referred to, marked "Petitioner's Exhibit No. 4" and received in evidence.)

By Mr. SIMS:

Q. In order for the record to be coherent, at this point, Mr. Wemyss, I believe, under the two trust indentures,
33 the other half of the net income from the trust funds was for the benefit of Mrs. More's only child?—A. Yes, sir.

Q. And upon her death or remarriage, the one-half of the income which would otherwise have accrued to Mrs. More reverted to the benefit of this son?—A. That is correct.

Mr. SIMS. Now, if the Court please, although as I understand the rulings, the Tax Court takes judicial notice of the regulations of the U. S. Treasury Department, for the benefit of the record and the Court in considering the question, we would like to put in evidence Regulations 79 with regard to gift tax promulgated by the U. S. Treasury Department Bureau, of Nashville, containing——

Judge MELLOTT. I would suggest to counsel that it is wholly unnecessary that the document be put in evidence. We will take

judicial notice of it, and you may put into your brief whatever you want.

Mr. SIMS. Then it will not be offered. That is the Petitioner's case.

Judge MELLOTT. Cross-examine.

Cross-examination by Mr. BAGLEY:

Q. When you were discussing with Mrs. More the proposed marriage, did she request you to transfer to her any particular assets or money of any particular value?—A. Well, my assets were all in the form of General Shoe stock, so it had to be——

Q. Did she ask that you agree to transfer to her any particular number of shares?—A. We discussed that and agreed on it.

Q. You mean she suggested a certain number?—A. Yes, sir.

Q. And you suggested a certain number?—A. Yes, sir. She suggested a given number.

Q. How did it happen that the number came out to be an odd number like No. 13189?—A. The certificate is written up that way.

Q. You mean you had decided on a number close to that amount?—A. Yes, sir.

34 Q. At the time you were discussing the proposed marriage, were you familiar with the provisions of the two trust instruments which have been introduced in evidence?—A. Oh, yes.

Q. Did you have any knowledge of the amount of income that had been accruing to Mrs. More from that source?—A. Yes, sir.

Q. *Ddi* you know Mrs. More was entitled to only one-half of the income?—A. Yes.

Q. Did you know that in the event of her marriage all of the income would revert to her son, Livingfield More?—A. Yes, sir.

Q. I believe you testified you had two children who were living at the time of this marriage?—A. Yes, sir.

Q. Did you not, on the same date, or immediately following your marriage on the same date, execute your will?—A. Yes, sir.

Q. On June 30, 1939?—A. Yes, sir.

Q. I will ask you if in this will after leaving a certain farm to Mrs. Wemyss, after making provision for leaving her a farm for life or for widowhood, you then provided your estate should be divided into three parts?—A. Yes, sir.

Q. And in determining the part that would be left in trust for Mrs. Wemyss, you specified it would be reduced by the value of 11,139 shares of stock of the General Shoe Company?—A. Yes, sir.

Q. That being the same kind of stock which you transferred to her in connection with the marriage contract.—A. Yes, sir.

Mr. BAGLEY. That's all.

Mr. SIMS. That is all. That is our case.

(Witness excused.)

Judge MELLOTT. Is that all the evidence for the Petitioner?

Mr. SIMS. Yes, sir.

Judge MELLOTT. Is there any evidence for the Respondent?

35 Mr. BAGLEY. No, sir.

Judge MELLOTT. Do you gentlemen desire to file briefs?

Mr. SIMS. We would like to make copies of the Girard Trust Company letter and withdraw that for that purpose temporarily and return it to the clerk.

Judge MELLOTT. Exhibit No. 2?

Mr. SIMS. No, No. 4.

Judge MELLOTT. You may give her a receipt for it and withdraw it.

Mr. SIMS. On the question of brief, I believe this is a very interesting question of law, and we have prepared considerable memorandums on the brief. I would like 45 days, although, frankly, I don't expect to use that. It just so happens that our particular firm has been designated by the war effort to the extent of 50 per cent, and being the youngest member of the firm, my legs are more in demand than my head, and, consequently, I may have to take 45 days, although I don't expect to; in fact, I expect to take only about ten days.

Judge MELLOTT. What do you say for the Respondent? Can you file your brief also within 45 days?

Mr. BAGLEY. I would like to have as long as your Honor will permit.

Mr. SIMS. Make it 30 days.

Judge MELLOTT. I think briefs can be filed within 30 days for the Petitioner and 30 days thereafter for Respondent, and 15 days for the filing of reply brief. That will be the order.

(Hearing concluded.)

Petitioner's Exhibit 1

This contract and agreement entered into by and between William H. Wemyss and Ellen Stokes More, both residents of Davidson County, Tennessee;

36 Witnesseth that:

Whereas, the said Ellen Stokes More has promised to marry William H. Wemyss on June 20, 1939; and,

Whereas, upon the consummation of said marriage, under the terms of a trust now being administered by the Girard Trust Company of Philadelphia, Pennsylvania, the said Ellen Stokes More will be deprived of a large monthly income; and,

Whereas, it is the desire and intention of the said William H. Wemyss to compensate said Ellen Stokes More for her aforesaid loss and to provide for and maintain her so long as she may live in keeping with her station in life; and

Now therefore, I, William H. Wemyss, have this day transferred in blank and delivered to the said Ellen Stokes More thirteen thousand one hundred and thirty nine (13,139) shares of the common capital stock of the General Shoe Corporation * * * evidenced by the following certificates:

Certificate No.	No. shares
6,001	472
6,495	231
844	900
840	1,000
839	1,000
837	9,536

In testimony whereof we, William H. Wemyss and Ellen Stokes More, have hereunto affixed our signatures.

This May 24th, 1939.

WILLIAM H. WEMYSS,
ELLEN STOKES MORE.

STATE OF TENNESSEE,
County of Davidson.

Personally appeared before me, Caskey Knott, a Notary Public in and for said County and State, the within-named
37 bargainors William H. Wemyss and Ellen Stokes More with whom I am personally acquainted, and who acknowledged that they executed the within instrument for the purposes therein contained.

My commission expires on the 7th day of January 1941.

Witness my hand and seal this May 24, 1939.

CASKEY KNOTT, *Notary Public.*

The foregoing instrument was recorded on June 21, 1939, in the Register's Office of Davidson County, Tennessee, book 1037, page 577.

Petitioner's Exhibit 2

Certified Copy. No. 19419. Recorded Oct. 7/1927. 5956.

E. L. MORE,
To Trust Agree,
Nash. Trust Co. Trustee.

This agreement executed this 6th day of June 1927, by and between E. L. More of River Falls, Alabama, hereinafter referred to as the Grantor, and the Nashville Trust Company, a corporation organized and existing under the laws of the State of Tennessee

with its principal place of business at Nashville, Tennessee, hereinafter referred to as the Trustee; witnesseth:

I

For and in consideration of the sum of $1.00 paid by the Trustee, the receipt of which is hereby acknowledged, and the agreement of the Trustee to perform the duties hereinafter imposed upon it, the Grantor does hereby transfer, assign, convey and de-
38 liver unto the Trustee for the uses and trusts hereinafter set forth, the following described property, to wit:

Six Hundred and Fifty (650) Shares of the Capital Stock of The Arcade Company, Nashville, Tennessee, evidenced by Stock Certificate No. 170.

II

The said Trustee shall hold the said property in trust in the manner and upon the terms, conditions, and limitations herein set out.

III

Said Trustee shall hold, manage and control the property constituting the corpus of said trust estate, and collect and receive the income arising therefrom.

IV

During the life of the said E. L. More the entire net income collected and received from said Trust Estate, is to be paid over to E. L. More to be used by him in his discretion for the support, maintenance, and education, and apportioned among the beneficiaries under this Trust mentioned or referred to in Subsections (a), (b), (c), (d), (e), and (f) of Section VIII hereof, or any one of them to the exclusion of any one or more of the other beneficiaries and in such proportions and in such manner as he deems proper.

The Trustee is and shall be fully discharged and released from any and all liability in respect to all disbursements made in accordance with the provisions of this Trust by the receipts given by the said E. L. More for sums paid to him.

V

After the death of the said E. L. More the Nashville Trust Company, Trustee, shall pay over the entire net income col-
39 lected and received from said Trust Estate to Ellen Stokes More if she be living, during the period of her life or until her remarriage or incapacity.

Said Ellen Stokes More to use said entire net income for her own support and maintenance and for the support, maintenance, and education of the children of the said E. L. More, and subject further to the conditions, diminutions, and limitations set out in this Instrument; and subject to the support, maintenance and education of the beneficiaries under this Trust as herein set out.

VI

After the death of E. L. More and after the death, marriage, or incapacity of the said Ellen Stokes More the entire net income collected and received from said Trust Estate is to be paid over to Rumsey Lewis if he be living at that time, to be used by him for the support, maintenance, and education of the beneficiaries under this trust as herein set out.

VII

If at that time, that is, after the death of the said E. L. More and at the death or marriage or incapacity of the said Ellen Stokes More, said Rumsey Lewis should not be living, then and in that event the Nashville Trust Company shall use said income for the support, maintenance, and education of the beneficiaries under this Trust, and dispose of the corpus of said property held in trust as herein set out, any surplus income to become a part of the corpus of this trust.

VIII

It is the intention of this instrument that these trusts shall be construed as separate and independent so as to provide a certain and sure income, subject to the provisions, conditions, and limitations hereinabove and hereinafter mentioned, for:

(a) The support, maintenance, and education of my child, Livingfield More, for his life.

(b) The support and maintenance of my wife, Ellen Stokes More during her life or until her remarriage, she to be entitled to a child's part.

(c) The support, maintenance, and education of any other children within the period herein set out, that I (E. L. More) may have; each of my children to take share and share alike.

(d) The support, maintenance, and education of my (E. L. More's) grandchildren or direct descedents within the period herein set out. But a grandchild or direct descendant is to take only after the death of his or her parent (the child of E. L. More); grandchildren or direct descendants to take the share of their deceased parent, and to participate in said share, share and share alike.

(e) In the event of the death of Livingfield More, and the death or marriage of my wife, Ellen Stokes More, and the death of all of my children without leaving surviving them a child or children (my grandchild or grandchildren or direct descendants) then and in that event said property is to be held in trust by the said Nashville Trust Company, Trustee, for my cousin and namesake, Livingfield More Frazer for his life, and for twenty-one years thereafter; when a distribution shall be made among his direct descendants, share and share alike.

F

But in the event that Livingfield More Frazer should not be then alive (at the happening of all of the events above mentioned in this paragraph (e), and is not survived by a child or children, or direct descendants, and in addition all of the other events above mentioned in this subsection (e) have occurred, then said property is to be held in trust by said Nashville Trust Company, Trustee, for the support and maintenance of Anita Lewis
41 Frazer, for her life, if she be living, or if she be dead for her heirs, as hereinafter set out.

IX

The income, and the proportionate parts thereof, from said property held in trust, for the separate and independent period of:

1. The life of my son, Livingfield More, who was born July 11, 1926.

2. The life or until the remarriage of Ellen Stokes More.

3. The life or lives of any other children that E. L. More may have.

4. For the grandchildren or direct descendants of E. L. More, who shall take the share of their parent would have taken if living, the share that their parent would have taken if living, the share that their parent would have taken to be divided equally among said deceased parent's children, shall be used as provided in this Instrument for the support, maintenance or education of the above-named beneficiaries (subject to the provisions of Section IV) to the exclusion of the beneficiaries mentioned or referred to in Subsections (e) and (f) of Section VIII above; and subject to the provisions of Section XIV.

X

After the death of the said E. L. More and in the event, and during the period, said income from said trust estate is paid

over to said Ellen Stokes More (the amount of said income to be paid over to said Ellen Stokes More to be subject however to diminution or diminutions of such sum or sums to be paid direct by said Nashville Trust Company, Trustee, to each one of the children of said E. L. More for the life of such child from
42 and after the time such child reaches the age of twenty-one years) and said Ellen Stokes More shall use the income paid over to her, or such parts as may be necessary, for her own support and maintenance, and for the support, maintenance, and education of the minor children of the said E. L. More.

The Trustee is and shall be fully discharged and released from any and all liability in respect to all disbursements made in accordance with the provisions of this Trust by the receipts given by the said Ellen Stokes More for sums paid to her.

XI

After the death of the said E. L. More and after the death or marriage of the said Ellen Stokes More, and in the event, and during the period, said income from said trust estate is paid over to Rumsey Lewis, said Rumsey Lewis shall use the entire income or such parts as may be necessary, for the support, maintenance, and education of the minor children of said E. L. More, if there are minor children at that time.

The amount of said income to be paid over to said Rumsey Lewis to be subject however to diminution or diminutions of such sum or sums to be paid direct by said Nashville Trust Company, Trustee, to each one of the children of said E. L. More for the life of such child from and after the time such child reaches the age of twenty-one years.

The Trustee is and shall be fully discharged and released from any and all liability in respect to all disbursements made in accordance with the provisions of this Trust by the receipts given by the said Rumsey Lewis for sums paid over to him, and any surplus income not drawn by him during any year shall become a part of the corpus of this trust.

XII

As each child of said E. L. More reaches the age of twenty-
43 one years, from and after that time, said Nashville Trust Company, Trustee, is to pay over to such child for life, direct, such proportionate part of said income that said child may be entitled to, computing such child's interest as follows:

(a) The total number of children surviving at the time of such distribution.

(b) The wife for the purpose of this computation to be considered as a child.

(c) The interest of the children of a deceased child to be computed at the share that the parent would have taken if living, shall be added together; the child reaching the age of twenty-one years to receive one of these parts of said income.

XIII

Upon the death of any child or descendant of E. L. More leaving surviving a child or children, the child or children of such deceased child or descendant of the said E. L. More shall take the share their parent s'ould have taken if living.

XIV

In the event that any of the separate and independent trusts herein created should fail, then and in that event the part of said income or corpus, as the case may be, of said trust property shall inure to the benefit of the remaining separate and independent trusts.

My wife, Ellen Stokes More, in no event however to receive for her own use a share in excess of one-half (½) of the net income from said property held in trust.

XV

Any and all stocks with voting power or powers held by the Trustee under this Trust are to be voted by the Trustee in accordance with a request in writing given by the said E. L. More during the life of the said E. L. More.

" After the death of the said E. L. More then and in that event said stocks are to be voted by the Trustee in accordance with a request in writing given by Rumsey Lewis if he be living at that time.

After the death of E. L. More and after the death of Rumsey Lewis, the Trustee in its discretion shall vote said stocks as it deems proper, provided however, that after the death of E. L. More and if and when and after Livingfield More reaches the age of twenty-one years, that said stocks shall be voted by said Trustee in accordance with a request in writing given by the said Livingfield More for his life; and in the event of the death of Livingfield More and if and when and after the next oldest male child of E. L. More reaches the age of Twenty-one years, that said stocks shall be voted by said Trustee in accordance with a request in writing given by the said male child, for his life.

XVI

At any time during the continuation of the trusts herein created, the said Trustee may sell all or any part of the property constituting the corpus of the same (except stock or interests or rights in the Arcade Company which shall not be sold but shall be held to be distributed among the beneficiaries hereunder at the termination of the trusts herein created and as hereinafter set out), and reinvest the proceeds of sale and take and hold the property purchased upon the same trusts, conditions, and limitations herein mentioned or referred to; Provided, however, that such sales and reinvestments during the life of the Grantor shall be made when and in the manner and upon such terms as he shall direct in writing. Provided, further, that after the death of the Grantor and during the life of Rumsey Lewis such sales and reinvestments shall be made when, and in the manner and upon such terms as he shall direct in writing with the written consent of both said Rumsey Lewis and the Grantor's wife, the said Ellen Stokes More, so long as said Ellen Stokes More remains a beneficiary under these trusts herein created.

45 Provided, further, that after the death of E. L. More and after the death of Rumsey Lewis and so long as Ellen Stokes More shall remain a beneficiary hereunder, her written consent for sales and reinvestments shall be required, except During the life of the Grantor, and Provided, Further, that after the death of the said E. L. More, the Grantor, and after the death of Rumsey Lewis and after Ellen Stokes More ceases to be a beneficiary hereunder, such sales and reinvestments shall be made when, and in the manner and upon such terms as the Trustee in its judgment may deem best; and Provided, further, that after the death of all of the above named, and if and when Ellen Stokes More ceases to be a beneficiary hereof, if Livingfield More has reached the age of twenty-one years, his consent in writing must be obtained for sales and reinvestments.

Provided, Further, that after the death of E. L. More, the Grantor, and after the death of Rumsey Lewis, and after Ellen Stokes More ceases to be a beneficiary hereunder, and if and when the oldest living male child of E. L. More reaches the age of twenty-one years, such sales and reinvestments shall be made by the Trustee only with the written consent of said male child.

If there is no living male child who has reached the age of twenty-one years, such sales and reinvestments shall be made when and in such manner and upon such terms as the Trustee in its judgment may deem best, but subject to all of the provisions of this Section.

XVII

The said Trustee shall not be required to make to any Court any report or reports of its conduct of any of the trusts herein created, all such reports being hereby expressly waived, but it shall render semi-annual statements to the respective beneficiaries herein named.

46

XVIII

In creating the trusts herein, the intention of the Grantor is to provide a certain and sure income for the maintenance and support of all of the beneficiaries thereof, and of each of them as herein directed; and each and every of the said beneficiaries shall have no power to anticipate, mortgage, assign, sell or in any way alienate either the corpus of the estate held in trust for them or any of them, or the income arising therefrom, during the continuation of the trusts; and neither said trust property nor any part thereof, either corpus or income, while the same is held in trust by the Trustee for the said beneficiaries, or any of them, shall be subject to execution of other legal process for any debt or liability any one or all of said beneficiaries may have contracted or incurred or may hereafter contract or incur.

XIX

The Grantor, may at any time during his life, remove the said Nashville Trust Company, as Trustee, under this instrument, or any successor Trustee, and appoint in its or his place and stead as such trustee, another and a new trustee, such removal and appointment to be made only by an instrument in writing executed by the Grantor and acknowledged by him before a Notary Public, and therafter delivered by him to the said Nashville Trust Company or to its successor, which shall thereafter put the same to record in the Register's Office for Davidson County, Tennessee; and such removal and appointment shall take effect only upon the qualification of the new trustee in the manner above provided. After such removal, appointment, and qualification, the old Trustee shall thereupon deliver to the new Trustee the trust property, executing such assignments and conveyances as shall be necessary to effectuate the transfer.

Upon the removal of any Trustee, and the appointment and qualification of another in its place and stead, as above provided, the succeeding Trustee shall take and hold the said trust property, and every part thereof, upon the same uses and trusts, and subject to the same terms, conditions, and limitations as the said trust property, and every part thereof was held by the former trustee.

46

XX

"The compensation of the Trustee, including its successors in trust," if any, shall be limited to a charge of Five percent (5%) on the income collected, and subject further to the provisions of Section XXIV thereof.

XXI

The Trustee joins herein in evidence of its acceptance of the trusts, and its agreement to perform the duties imposed by this instrument, and to acknowledge the receipt of the property herein described.

XXII

At the date of the execution of this Instrument, there is in being, the following beneficiaries:

1. Livingfield More, my son, born July 11, 1926.
2. My wife, Ellen Stokes More, born February 9, 1895.
3. My cousin and namesake, Livingfield More Frazer born December 20, 1915.
4. Anita Lewis Frazer, born October 20, 1885.
5. Children of Anita Lewis Frazer, names and ages as follows:

(1) Eugene Lewis Frazer, born May 27, 1906.
(2) James Stokes Frazer, born August 11, 1907.
(3) Lewis Frazer, born January 24, 1909.
(4) Washington Frazer, born September 6, 1910.
(5) Dudley Dunn Frazer, born September 7, 1912.
(6) Anita Lewis Frazer, born April 2, 1914.
48 (7) Livingfield More Frazer, born December 20, 1915.

This Trust shall terminate and a distribution of the corpus of said trust estate be made, twenty-one years after the death of the survivor of all of the above named, at which time the Trustee shall distribute the corpus of the said fund and any accumulations or additions thereto (subject to the sooner termination of these Trusts, as set out in Subsections (e) and (f) of Section VIII above), as follows:

1. To the direct descendants of E. L. More, share and share alike that may be living twenty-one years after the death of the survivor of all of the above-named in this Section XXII. Such distribution to be made subject to the provisions of Section XIII hereinabove and subsection 4 of Section IX hereinabove.

2. If there is no direct descendant of E. L. More then and in that event the corpus of said fund and any accumulations or additions thereto are to be distributed among the direct descendants of Livingfield More Frazer, share and share alike.

Such distribution among the descendants of Livingfield More Frazer to be governed by the same rules as set out in Section XIII hereinabove, and as set out in subsection 4 of Section IX hereinabove.

3. In the event there are no persons living in the classes above mentioned or referred to in subsection (1) and (2) above in this section, then and in that event said trust fund shall be distributed among the heirs of Anita Lewis Frazer.

Such distribution among the heirs of Anita Lewis Frazer to be governed by the same rules as set out in Section XIII hereinabove, and as set out in subsection 4 of Section IX hereinabove.

XXIII

The Grantor may at any time or times hereafter transfer,
49 assign, and convey additional property to the Trustee to be held in accordance with the terms of this agreement as though the same had been originally transferred, assigned, and conveyed hereunder.

XXIV

The compensation of the Trustee, including its successors in trust, if any, shall be limited to a charge on the income collected and at the following rates:

(a) So long as the corpus constituting the trust consists of Six Hundred Fifty (650) shares of the stock of the Arcade Company, the maximum charge shall not exceed Five Hundred ($500.00) Dollars per annum.

(b) In the event the income collected should not exceed Ten Thousand ($10,000.00) Dollars, then and in that event a charge of five (5) percent on income less than Ten Thousand ($10,000.00) Dollars.

(c) In the event that additional property is transferred, assigned, and conveyed to the Trustee to be held in accordance with the terms of this agreement as provided, in Section XXIII hereof, the compensation of the Trustee including its successors in trust, if any, shall be five (5) percent on amounts from One Thousand ($1,000.00) Dollars to Ten Thousand ($10,000.00) Dollars; two (2) percent on amounts from Ten Thousand ($10,000.00) Dollars to Twenty Thousand ($20,000.00) Dollars; one and one-half (1½) percent on amounts from Twenty Thousand ($20,000.00) Dollars to Thirty Thousand ($30,000.00) Dollars; and one (1) percent on all amounts over Thirty Thousand ($30,000.00) Dollars.

(d) In the event investments or reinvestments are made by the Trustee, on its sole responsibility, of any part of the property

held in trust, then and in that event the compensation of the Trustee shall be five (5) percent on the income collected from such investments or reinvestments.

XXV

In witness whereof, the Grantor, has hereunto set his
50 hand and the said Nashville Trust Company, the Trustee, has caused its name to be hereunto signed by its 1st Vice President and its corporate seal to be hereunto affixed and attested by its Secretary, the day and year first above written.

E. L. More,
Nashville Trust Company,
By Chas. Nelson,
1st Vice Pres.

[SEAL] Nashville Trust Company,
Nashville, Tenn.

Attest:
M. S. Webb, *Secretary.*

State of Tennessee.
County of Davidson, ss:

Personally appeared before me, H. French Brown, a Notary Public in and for said County and State, the within named E. L. More, the bargainor, with whom I am personally acquainted, and who acknowledged that he executed the within instrument for the purposes therein contained.

Witness my hand and official seal at Nashville, Tennessee, this the 28th day of June 1927.

[SEAL] H. French Brown
Notary Public.

My commission expires July 2, 1927.

H. French Brown, Notary Public. Com. Expires July 2, 1927. Davidson Co., Tenn.

51 State of Tennessee.
County of Davidson, ss:

Before me, French Brown, a Notary Public in and for the County and State aforesaid, personally appeared Charles Nelson and M. S. Webb, with whom I am personally acquainted, and who upon oath acknowledged themselves to be the Vice President and Secretary respectively of the Nashville Trust Company, Trustee, the within named bargainor, a corporation: and that they as such Vice President and Secretary, being authorized so to do, executed the foregoing Instrument for the purposes therein contained by signing the name of the corporation by Charles Nelson

as such Vice President and by attesting the same and affixing the corporate seal by M. S. Webb as such Secretary.

Witness my hand and official seal at Office at Nashville, Tennessee, this 28th day of June 1927.

[SEAL] H. FRENCH BROWN,
Notary Public.

H. French Brown, Notary Public. Com. Expires July 2, 1927. Davidson Co., Tenn. Received Sept 26/1927 at 10:54 A. M.

I, Ernest Parker, Register for Davidson County, hereby certify that the foregoing is a true and correct copy of the "Trust Agreement" from E. L. More to Nashville Trust Co., Trustee, as same appears of record in my office in book No. 778, page 16, witness my official signature at office this 9 day of Nov. 1932.

[SEAL] ERNEST H. PARKER,
Register of Davidson County.
By CATHERINE MCKINSTRY,
Deputy Register.

52 We hereby certify that the foregoing is a true & correct copy of the above Trust Agreement.

GIRARD TRUST COMPANY,
L. COATES,
Asst. Trust Officer.

Petitioner's Exhibit 3

[Copy.]

This agreement executed this 15th day of June 1929, by and between E. L. More of River Falls, Alabama, hereinafter referred to as the Grantor, and the Nashville Trust Company, a corporation organized and existing under the laws of the State of Tennessee with its principal place of business at Nashville, Tennessee, hereinafter referred to as the Trustee; witnesseth:

I

For and in consideration of the sum of $1.00 paid by the trustee, the receipt of which is hereby acknowledged, and the agreement of the trustee to perform the duties hereinafter imposed upon it, the grantor does hereby transfer, assign, convey and deliver unto the trustee for the uses and trusts hereinafter set forth, the following-described property, to wit:

Twenty (20) shares of the Capital Stock of The Arcade Company, Nashville, Tennessee, evidenced by Stock Certificate No. 174.

II

The said Trustee shall hold the said property in trust in the manner and upon the terms, conditions and limitations herein set out.

53 III

Said Trustee shall hold, manage and control the property constituting the corpus of said trust estate, and collect and receive the income arising therefrom.

IV

During the life of the said E. L. More the entire net income collected and received from said Trust Estate, is to be paid over to E. L. More to be used by him in his discretion for the support, maintenance, and education, and apportioned among the beneficiaries under this trust mentioned or referred to in Subsections (a), (b), (c), (d), (e), and (f) of Section VIII hereof, or any one of them to the exclusion of any one or more of the other beneficiaries and in such proportions and in such manner as he deems proper.

The Trustee is and shall be fully discharged and released from any and all liability in respect to all disbursements made in accordance with the provisions of this Trust by the receipts given by the said E. L. More for sums paid to him.

V

After the death of the said E. L. More, the Nashville Trust Company, Trustee, shall pay over the entire income collected and received from said trust estate to Ellen Stokes More if she be living, during the period of her life or until her remarriage or incapacity.

Said Ellen Stokes More to use said entire net income for her own support and maintenance and for the support, maintenance and education of the children of the said E. L. More, and subject further to the conditions, diminutions, and limitations set out in this Instrument; and subject to the support, maintenance and education of the beneficiaries under this Trust as herein set out.

VI

54 After the death of E. L. More and after the death, marriage or incapacity of the said Ellen Stokes More the entire net income collected and received from said trust estate is to be paid over to Rumsey Lewis if he be living at the time, to

be used by him for the support, maintenance and education of the beneficiaries under this trust as herein set out.

VII

If, at that time, that is, after the death of the said E. L. More, and at the death or marriage or incapacity of the said Ellen Stokes More, said Rumsey Lewis should not be living, then and in that event the Nashville Trust Company shall use said income for the support, maintenance, and education of the beneficiaries under this trust, and dispose of the corpus of said property held in trust as herein set out, any surplus income to become a part of the corpus of this trust.

VIII

It is the intention of this Instrument that these Trusts shall be construed as separate and independent so as to provide a certain and sure income, subject to the provisions, conditions, and limitations hereinabove and hereinafter mentioned, for:

(a) The support, maintenance, and education of my child, Livingfield More, for his life.

(b) The support and maintenance of my wife, Ellen Stokes More during her life or until her remarriage, she to be entitled to a child's part.

(c) The support, maintenance, and education of any other children within the period herein set out, that I (E. L. More) may have; each of my children to take, share and share alike.

(d) The support, maintenance and education of my (E. L. More's) grandchildren or direct descendants within the period herein set out. But a grandchild or direct descendant is to take only after the death of his or her parent (the child of E. L. More); grandchildren or direct descendants to take the share of their deceased parent, and to participate in said share, share and share alike.

(e) In the event of the death of Livingfield More, and the death of marriage of my wife, Ellen Stokes More, and the death of all my children without leaving surviving them a child or children (my grandchild or grandchildren or direct descendants) then and in that event said property is to be held in trust by the said Nashville Trust Company, Trustee, for my cousin and name sake, Livingfield More Frazer for his life, and for twenty-one years thereafter, when a distribution shall be made among his direct descendants, share and share alike.

(f) But in the event that Livingfield More Frazer should not be then alive (at the happening of all of the events above mentioned in this paragraph (e), and is not survived by a child or

children, or direct descendants, and in addition all of the other events above mentioned in this subsection (e) have occurred, then said property is to be held in trust by said Nashville Trust Company, Trustee, for the support and maintenance, of Anita Lewis Frazer, for her life, if she be living, or if she be dead for her heirs, as hereinafter set out.

IX

The income, and the proportionate parts thereof, from said property held in trust, for the separate and independent periods of:

1. The life of my son, Livingfield More, who was born July 11, 1926.

2. The life or until the remarriage of Ellen Stokes More.

3. The life or lives of any other children that E. L. More may have.

4. For the grandchildren or direct descendants of E. L. More who shall take the share their parent would have taken if living, the share that their parent would have taken to be divided equally among said deceased parent's children, shall be used as provided in this Instrument for the support maintenance or education of the above-named beneficiaries (subject to the provisions of Section IV) to the exclusive of the beneficiaries mentioned or referred to in Subsection (e) and (f) of Section VIII above; and subject to the provisions of Section XIV.

56

X

After the death of the said E. L. More and in the event, and during the period, said income from said trust estate is paid over to said Ellen Stokes More (the amount of said income to be paid over to said Ellen Stokes More to be subject however to dimunution or diminutions of such sum or sums to be paid direct by said Nashville Trust Company, Trustee, to each one of the children of said E. L. More for the life of such child from and diminution or diminutions of such sum or sums to be paid direct after the time such child reaches the age of twenty-one years) and said Ellen Stokes More shall use the income paid over to her, or such parts as may be necessary, for her own support and maintenance, and for the support, maintenance, and education of the minor children of the said E. L. More.

The Trustee is and shall be fully discharged and released from any and all liability in respect to all disbursements made in accordance with the provisions of this trust by the receipts given by the said Ellen Stokes More for sums paid to her.

XI

After the death of the said E. L. More and after the death or marriage of the said Ellen Stokes More, and in the event, and during the period, said income from said trust estate is paid over to Rumsey Lewis, said Rumsey Lewis shall use the entire income or such parts as may be necessary, for the support,
57 maintenance, and education of the minor children of said E. L. More, if there are minor children at that time.

The amount of said income to be paid over to said Rumsey Lewis to be subject however to diminution or diminutions of such sum or sums to be paid direct by said Nashville Trust Company, Trustee, to each one of the children of said E. L. More for the life of such child from and after the time such child reaches the age of twenty-one years.

The Trustee is and shall be fully discharged and released from any and all liability in respect to all disbursements made in accordance with the provisions of this Trust by the receipts given by the said Rumsey Lewis for sums paid over to him, and any surplus income not drawn by him during any year shall become a part of the corpus of this trust.

XII

As each child of said E. L. More reaches the age of twenty-one years, from and after that time, said Nashville Trust Company, Trustee, is to pay over to such child for life, direct, such proportionate part of said income that said child may be entitled to, computing such child's interest as follows:

(a) The total number of children surviving at the time of such distribution.

(b) The wife for the purpose of this computation to be considered as a child.

(c) The interest of the children of a deceased child to be computed at the share that the parent would have taken if living, shall be added together; the child reaching the age of twenty-one years to receive one of these parts of said income.

XIII

Upon the death of any child or descendant of E. L. More
58 leaving surviving a child or children, the child or children of such deceased child or descendant of the said E. L. More shall take the share their parent would have taken if living.

XIV

In the event that any of the separate and independent trusts herein created should fail, then and in that event the part of said

income or corpus, as the case may be, of said trust property shall inure to the benefit of the remaining separate and independent trusts.

My wife, Ellen Stokes More, in no event however to receive for her own use a share in excess of one-half (½) of the net income from said property held in trust.

XV

Any and all stocks with voting power or powers held by the Trustee under this Trust are to be voted by the Trustee in accordance with a request in writing given by the said E. L. More during the life of the said E. L. More.

After the death of the said E. L. More then and in that event said stocks are to be voted by the Trustee in accordance with *accordance with* a request in writing given by Rumsey Lewis if he be living at that time.

After the death of E. L. More and after the death of Rumsey Lewis, the Trustee in its discretion shall vote said stocks as it deems proper, provided, however, that after the death of E. L. More and if and when and after Livingfield More reaches the age of twenty one years, that said stocks shall be voted by said Trustee in accordance with a request in writing given by the said Livingfield More for his life; and in the event of the death of Livingfield More, and if and when and after the next oldest male child of E. L. More reaches the age of twenty-one years, that said stocks shall be voted by said Trustee in accordance with a request in writing given by the said male child, for his life.

59 XVI

At any time during the continuation of the trusts herein created, the said Trustee may sell all or any part of the property constituting the corpus of the same (except stock or interests or rights in the Arcade Company which shall not be sold but shall be held to be distributed among the beneficiaries hereunder at the termination of the trusts herein created and as hereinafter set out), and reinvest the proceeds of sale and take and hold the property purchased upon the same trusts, conditions, and limitations herein mentioned or referred to; provided, however, that such sales and reinvestment during the life of the Grantor shall be made when and in the manner and upon such terms as he shall direct in writing. Provided, further, that after the death of the Grantor and during the life of Rumsey Lewis such sales and reinvestments shall be made when, and in the manner and upon such terms as he shall direct in writing with the written consent of both said

Rumsey Lewis and the Grantor's wife, the said Ellen Stokes More, so long as said Ellen Stokes More remains a beneficiary under these trusts herein created.

Provided, further, that after the death of E. L. More and after the death of Rumsey Lewis and so long as Ellen Stokes More shall remain a beneficiary hereunder, her written consent for sales and reinvestments shall be required. Except during the life of the Grantor, and Provided, further, that after the death of the said E. L. More, the Grantor, and after the death of Rumsey Lewis and after Ellen Stokes More ceases to be a beneficiary hereunder, such sales and reinvestments shall be made when, and in the manner and upon such terms as the Trustee in its judgment may deem best; and provided, further, that after the death of all of the above named, and if and when Ellen Stokes More ceases to be a beneficiary hereof, if Livingfield More has reached the age of twenty-one years, his consent in writing must be obtained for sales and reinvestments.

60 Provided, However that after the death of E. L. More, the Grantor, and after the death of Rumsey Lewis, and after Ellen Stokes More ceases to be a beneficiary hereunder, and if and when the oldest living male child of E. L. More reaches the age of twenty-one Years, such sales and reinvestments shall be made by the Trustee only with the written consent of said male child.

If there is no living male child who has reached the age of twenty-one years, such sales and reinvestments shall be made when and in such manner and upon such terms as the Trustee in its judgment may deem best, but subject to all of the provisions of this Section.

XVII

The said Trustee shall not be required to make to any Court any report or reports of its conduct of any of the trusts herein created, all such reports being hereby expressly waived, but it shall render semiannual statements to the respective beneficiaries herein named.

XVIII

In creating the trusts herein, the intention of the Grantor is to provide a certain and sure income for the maintenance and support of all of the beneficiaries thereof, and of each of them as herein directed, and each and every of the said beneficiaries shall have no power to anticipate, mortgage, assign, sell or in any way alienate either the corpus of the estate held in trust for them or any of them, or the income arising therefrom, during the continuation of the trusts; and neither said trust property nor any

part thereof, either corpus or income, while the same is held in trust by the Trustee for the said beneficiaries, or any of them, shall be subject to execution or other legal process for any debt or liability any one or all of said beneficiaries may have contracted or incurred or may hereinafter contract or incur.

XIX

The Grantor may at any time during his life remove the
61 said Nashville Trust Company, as Trustee under this Instrument, or any successor Trustee, and appoint in its or his place and stead as such trustee, another and a new trustee, such removal and appointment to be made only by an instrument in writing executed by the Grantor and acknowledged by him before a Notary Public, and thereafter delivered by him to the said Nashville Trust Company or to its successor, which shall thereafter put the same to record in the Register's Office for Davidson County, Tennessee; and such removal and appointment shall take effect only upon the qualification of the new trustee in the manner above provided, after such removal, appointment, and qualification, the old Trustee shall thereupon deliver to the new Trustee the trust property, executing such assignments and conveyances as shall be necessary to effectuate the transfer.

Upon the removal of any Trustee, and the appointment and qualification of another in its place and stead, as above provided, the succeeding Trustee shall take and hold the said trust property, and every part thereof, upon the same uses and trusts, and subject to the same terms, conditions and limitations as the said trust property, and every part thereof, was held by the former trustee.

XX

The compensation of the Trustee, including its successors in trust, if any, shall be limited to a charge of five percent (5%) on the income collected, and subject further to the provisions of Section XXIV thereof.

XXI

The Trustee joins herein in evidence of its acceptance of the trusts, and its agreement to perform the duties imposed by this instrument, and to acknowledge the receipt of the property herein described.

XXII

At the date of the execution of this Instrument, there is in being, the following beneficiaries:

1. Livingfield More, my son, born July 11, 1926.

62 2. My wife, Ellen Stokes More, born February 9, 1895.

3. My cousin and namesake, Livingfield More Frazer, born December 20, 1915.

4. Anita Lewis Frazer, born October 20, 1885.

5. Children of Anita Lewis Frazer, names and ages as follows:

(1) Eugene Lewis Frazer, born May 27, 1906.

(2) James Stokes Frazer, born August 11, 1907.

(3) Lewis Frazer, born January 24, 1909.

(4) Washington Frazer, born September 6, 1910.

(5) Dudley Dunn Frazer, born September 7, 1912.

(6) Anita Lewis Frazer, born April 2, 1914.

(7) Livingfield More Frazer, born December 20, 1915.

This Trust shall terminate and a distribution of the corpus of said trust estate be made, twenty one years after the death of the survivor of all of the above named, at which time the Trustee shall distribute the corpus of the said fund and any accumulations or additions thereto (subject to the sooner termination of these Trusts, as set out in Subsections (e) and (f) of Section VIII above), as follows:

1. To the direct descendants of E. L. More share and share alike that may be living twenty-one years after the death of the survivor of all of the above named in this section XXII such distribution to be made subject to the provisions of Section XIII hereinabove and subsection 4 of Section IX hereinabove.

2. If there is no direct descendant of E. L. More then and in that event the corpus of said fund and any accumulations or additions thereto are to be distributed among the direct descendants of Livingfield More Frazer share and share alike.

Such distribution among the descendants of Livingfield
63 More Frazer to be governed by the same rules as set out in section XIII hereinabove, and as set out in subsection 4 of Section IX hereinabove. 3. In the event there are no persons living in the classes above mentionel or referred to in subsections (1) and (2) above in this section then and in that event said trust fund shall be distributed among the heirs of Anita Lewis Frazer.

Such distribution among the heirs of Anita Lewis Frazer to be governed by the same rules as set out in Section XIII hereinabove, and as set out in subsection 4 of Section IX hereinabove.

XXIII

The Grantor may at any time or times hereafter transfer, assign, and convey additional property to the Trustee to be held in accordance with the terms of this agreement as though the same had been originally transferred, assigned, and conveyed hereunder.

XXIV

The compensation of the Trustee, including its successors in trust, if any, shall be limited to a charge on the income collected and at the following rates:

(a) So long as the corpus constituting the trust consists of twenty (20) shares of the stock of the Arcade Company, the maximum charge shall not exceed five Hundred ($500.00) Dollars per annum.

(b) In the event the income collected should not exceed Ten Thousand ($10,000.00) Dollars, then and in that event a charge of five (5) percent on income less than Ten Thousand ($10,000.00) Dollars.

(c) In the event that additional property is transferred, assigned, and conveyed to the Trustee to be held in accordance with the terms of this agreement as provided in Section XXIII hereof, The compensation of the Trustee including its successors in trust, if any, shall be five (5) percent on amounts from One Thousand ($1,000.00) Dollars to Ten Thousand ($10,000.00) Dollars; two (2) percent on amounts from Ten Thousand ($10,000.00) Dollars to Twenty Thousand ($20,000.00) Dollars; one and
64 one half (1½) percent on amounts from Twenty Thousand ($20,000.00) Dollars to Thirty Thousand ($30,000.00) Dollars; and one (1) percent on all amounts over thirty thousand ($30,000.00) Dollars.

(d) In the event investments or reinvestments are made by the Trustee, on its sole responsibility, of any part of the property held in trust, then and in that event the compensation of the Trustee shall be five (5) percent on the income collected from such investments or reinvestments.

XXV

In witness whereof, the Grantor, has hereunto set his hand and the said Nashville Trust Company, the Trustee, has caused its name to be hereunto signed by its Vice President and its corporate seal to be hereunto affixed and attested by its Secretary, the day and year first above written.

(Signed) E. L. MORE (E. L. More),
Nashville Trust Company.

(Signed) By W. W. MCNEILLY,
Vice Pres.

Attest:

(Signed) M. S. WEBB, *Secretary.*

622032—44——4

STATE OF ALABAMA,
Covington County.

I, E. W. Arwood, a Notary Public in and for said County and State, hereby certify that E. L. More, whose name is signed to the foregoing instrument, and who is known to me acknowledged before me, of this day, that, being informed of the contents of the Instrument, he executed the same voluntarily, on the date the same bears date.

Given under my hand, this 15th day of June 1929.

E.W. ARWOOD, *Notary Public.*

My commission expires March 17, 1931.

65 STATE OF TENNESSEE,
County of Davidson.

Before me, H. French Brown, a Notary Public in and for the County and State aforesaid, personally appeared W. W. McNeilly and M. S. Webb, with whom I am personally acquainted, and who upon oath acknowledged themselves to be the Vice President and Secretary respectively of the Nashville Trust Company, Trustee, the within named bargainor, a corporation; and that they as such Vice President and Secretary, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing the name of the corporation by W. W. McNeilly as such Vice President and by attesting the same and affixing the corporate seal by M. S. Webb as such Secretary.

Witness my hand and official seal at office at Nashville, Tennessee, this 20th day of June 1939.

H. FRENCH BROWN, *Notary Public.*

My commission expires Jany. 30, 1932.

Rec'd Nov. 7, 1932, at 2:35 P. M.

I, Ernest Parker, Register for Davidson County, hereby certify that the foregoing is a true and correct copy of the Trust Agreement from E. L. More to Nashville Trust Co., Tr, as same appears of record in my office in book No. 717, page 549, witness my official signature at office this 9 day of Nov. 1932.

[SEAL]

ERNEST H. PARKER,
Register of Davidson County.
Signed By CATHERINE MCKINSTRY,
Deputy Register.

We hereby certify that the foregoing is a true and correct copy of the above Trust Agreement.

GIRARD TRUST COMPANY,
L. COATES,
Asst. Trust Officer.

66 *Petitioner's Exhibit 4*

GIRARD TRUST COMPANY
Chartered 1836
Broad & Chestnut Streets
PHILADELPHIA

James E. Gowen, President.

APRIL 17, 1943.

Deeds of Trust E. L. MORE,
Mr. W. H. WEMYSS,
General Shoe Company, Nashville, Tennessee.

DEAR MR. WEMYSS: In accordance with Mrs. Wemyss' request on the telephone this morning, we are sending you with this a list of the amounts paid to Mrs. Wemyss year by year from February 9, 1934, to June 20, 1939, the date of Mrs. Wemyss' marriage. This information has been taken from the periodical statements in the deeds of trust, copies of which have been sent to Mrs. Wemyss.

Deed of Trust dated June 6, 1927

1934 from February 9th	$9,222.45
1935	11,034.14
1936	9,411.50
1937	9,253.32
1938	11,211.92
1939 to June 20th	6,972.10
	57,105.43

Deed of Trust dated June 15, 1929

1934 from February 9th	$283.81
1935	337.25
1936	289.75
1937	285.00
1938	342.00
67 1939 to June 20th	214.54
	1,752.35

Trusting this is the information which Mrs. Wemyss requires and that if there is any further information needed you will not hesitate to call upon us, we are

Yours very truly,

W. L. CLEAVES, *Trust Officer.*

W. L. Cleaves/MJB.

In United States Circuit Court of Appeals for the Sixth Circuit

[Title omitted.]

Petition for review

Filed Dec. 6, 1943

Now comes William H. Wemyss by his attorney, Cecil Sims, and hereby petitions the United States Circuit Court of Appeals for the Sixth Circuit to review the decision entered by the Tax Court of the United States on October 14, 1943, ordering and deciding that there are deficiencies in gift tax of $12,995.66 and $3,965.20 for the calendar years 1939 and 1940, respectively. This petition for review is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

The individual gift tax returns for petitioner for the calendar years 1939 and 1940, respectively, were filed with the Collector of Internal Revenue for the District of Tennessee, whose office is within the jurisdiction of the United States Circuit Court of Appeals for the Sixth Circuit.

(S) CECIL SIMS,
1000 American Trust Building,
Nashville 3, Tennessee.

68 In the United States Circuit Court of Appeals
for the Sixth Circuit

[Title omitted.]

Notice of filing petition for review

Filed Dec. 8, 1943

To J. P. WENCHEL, *Chief Counsel, Bureau of Internal Revenue.*

You are hereby notified that William H. Wemyss did, on the 6th day of Dec. 1943, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the sixth Circuit, of the decision of this Court heretofore rendered in the above-entitled case. Copy of the petition for review as filed is hereto attached and served upon you.

Dated this 7th day of Dec. 1943.

(S) B. D. GAMBLE,
Clerk, The Tax Court of the United States.

Service of copy of petition for review acknowledged this 8th of Dec. 1943.

(S) J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue,
Attorney for Respondent.

69 In United States Circuit Court of Appeals for the Sixth Circuit

[Title omitted.]

Designation of contents of record on appeal

Filed Dec. 13, 1943

William H. Wemyss, Petitioner on Review, hereby designates the following portions of the record, proceedings and evidence to be contained in the record on appeal:

1. Docket entries of the proceedings before the Tax Court of the United States.

2. Pleadings before the Tax Court:

(a) Petition for redetermination of deficiency, including copy of notice of deficiency attached thereto and marked Exhibit "A";

(b) Answer of Commissioner;

(c) Motion for amendment to petition granted July 1, 1943;

(d) Amendment to petition filed pursuant to motion granted July 1, 1943;

(e) Answer of Commissioner to amendment to petition.

3. Findings of Fact and Opinion, including dissenting opinion of Disney, J., promulgated October 14, 1943.

4. Decision entered October 14, 1943.

5. Entire transcript of proceedings before the Tax Court of the United States at a hearing held at Nashville, Tennessee, April 20, 1943, including stenographic report of the evidence and all exhibits filed in the evidence in the course of the hearing, two copies of which are filed herewith.

6. Petition for review with proof of service of notice of filing of petition for review and service of copy of petition for review.

70 7. This designation.

(S) CECIL SIMS,
1000 American Trust Building,
Nashville 3, Tennessee,
Counsel for Petitioner.

I hereby certify that service has been made by mailing a copy of this praecipe to J. P. Wenchel, Esq., Chief Counsel, Bureau of

Internal Revenue, Washington, D. C. This 3rd day of December, 1943.

(S) CECIL SIMS,
Counsel for Petitioner.

[Clerk's certificate to foregoing transcript omitted in printing.]

72 In United States Circuit Court of Appeals, Sixth Circuit

Cause argued and submitted

June 1, 1944

Before HICKS, SIMONS, and MARTIN, JJ.

This cause is argued by Cecil Sims for Petitioner and by I. Henry Kutz for Respondent and is submitted to the court.

In United States Circuit Court of Appeals

Judgment

Entered July 24, 1944

On petition to review decision of the Tax Court of the United States.

This cause came on to be heard on the transcript of record from the Tax Court of the United States, and was argued by counsel.

73 On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decision of the said Tax Court in this cause be and the same is hereby reversed.

74 In United States Circuit Court of Appeals,
Sixth Circuit

No. 9724

WILLIAM H. WEMYSS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition to Review the Decision of the Tax Court of the United States

Opinion

Filed July 24, 1944

Before HICKS, SIMONS, and MARTIN, Circuit Judges.

MARTIN, Circuit Judge. This gift tax litigation stems from a prenuptial contract in writing, dated May 24, 1939, between the

petitioner, William H. Wemyss, and a widow, Mrs. Ellen Stokes More, whom he married on June 20, 1939. Sometime prior to the execution of the contract, petitioner made a proposal of marriage to Mrs. More. Here answer was that she would be unwilling to marry him and lose in consequence a life income provided for her "until her remarriage" under trust indentures executed by her deceased husband, E. L. More, unless petitioner would enter into a premarriage contract to make good her loss.

Petitioner agreed to meet her requirements, even to the detail of the securities to be transferred to her. Her father, who was a lawyer, prepared the premarriage contract with succinct legal documentation. The widow exacted that the contract be carried out by the actual transfer and delivery to her of the stocks described therein prior to the performance of the marriage ceremony. The premarriage contract designated the date for the ceremony and the parties consummated the marriage as scheduled.

The agreement recited that upon consummation of the marriage, Mrs. More would be deprived of a large month-
75 ly income, and that it was the desire and intention of the petitioner to compensate her for such loss and to provide and maintain her permanently in keeping with her station in life. The 13,139 shares of common stock of General Shoe Corporation which were transferred and delivered to Mrs. More on the date of the execution of the contract were described by certificate number. The contract was acknowledged by the two parties, and on the day following the marriage ceremony was recorded in the register's office of their resident county in Tennessee.

Immediately after the marriage, the petitioner executed a will, in which he provided that his wife should have a life estate during widowhood in a certain farm and that one-third of his estate, less the value of all except 2,000 shares of General Shoe Corporation stock already transferred, should be held in trust for her.

The corpus of the trust estate, in which the former Mrs. More lost her interest upon remarriage, consisted of 670 shares of stock in the Arcade Company of Nashville, Tennessee. The trust indenture executed by her first husband provided that the entire net income of the trust estate should be paid to her during her lifetime, or until her remarriage, for the maintenance and support of herself and their son. The trusts, however, were separate and independent trusts for the widow and for the son. From February 9, 1934, to June 20, 1939, Mrs. More had received $29,428.89 from the trusts created by her first husband, as income for her own use, and an equal amount for the use and benefit of her son.

At the time Mrs. More entered into the marriage contract with the petitioner, William H. Wemyss, she was 44 years of age and he was 59.

On this state of facts, the Commissioner of Internal Revenue determined that the transfer by petitioner to Mrs. More, on May 24, 1939, of the 13,139 shares of General Shoe Corporation stock, was not for a consideration in money or money's worth, and accordingly that the transfer constituted a gift of an amount equal to the value of the stock, which he determined to be $149,456.13. The United States Tax Court, one judge dissenting, upheld the commissioner in his determination of a tax deficiency against the petitioner upon that basis; and the taxpayer, by appropriate petition, has brought the case here for review.

The tax court conceded the correctness of petitioner's contention that the agreement to marry constituted a valuable consideration for the transfer of the stock. Prewit v. Wilson, 103 U. S. 22; Barnum 1. LeMaster, 110 Tenn. 638, 73 S. W. 1045. It was, therefore, declared that no taxable gift was made, if only section 501(a) of the Revenue Act were to be considered.[1]

76

But the tax court held that the transfer was made for less than an adequate and full consideration in money or money's worth and was therefore subject to gift tax under section 503 of the Revenue Act of 1932, which provides: "Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this title be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year." Marriage, as a consideration, was deemed immeasurable in money or money's worth, and the value of the property transferred was held to be the amount taxable as a gift, not to be reduced by the value of the wife's interest in her first husband's trusts lost by her upon her marriage to petitioner.

The tax court construed section 503 of the Revenue Act as supplementary to section 501, and as manifesting the intention of Congress to include within the category of gift taxation not only a transfer which constituted a gift at common law but also a transfer of property for less than an adequate and full consideration in money or money's worth. A promise of marriage was not deemed by the court to be such consideration. Articles 1 and 8 of Treasury

[1] SEC. 501. Imposition of Tax.—(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

Regulations 79[2] were stressed as definitive and binding, especially in view of the repeated reenactment of the statute which these regulations construed. Helvering v. Winmill, 305 U. S. 79, and Taft v. Commissioner, 304 U. S. 351, were cited.

The tax court reasoned that, assuming the loss by the wife of the income from the trusts created by her first
77 husband was the consideration for the transfer to her of the Shoe Corporation stock "rather than a mere consequence of the marriage," the petitioner could not prevail for the reason that he acquired no right in or income from the trusts but received merely a promise of marriage, not measurable in money or money's worth. It was considered that the word "gift" must necessarily be construed in the broadest and most comprehensive sense. Robinette v. Helvering, 318 U. S. 184; Smith v. Shaughnessy, 318 U. S. 176.

The court pointed out that unless the gift tax should be imposed when the transfer was made, the excise upon the transfer would be "altogether escaped;" and that the gift tax and the estate tax are in pari materia, an important purpose of the former being to prevent or compensate for avoidance of death taxes by taxing gifts of property *inter vivos* which, except for the gifts, would be subject to the tax upon transfers at death. Estate of Sanford v. Commissioner, 308 U. S. 39. It was thought reasonable to assume that Congress, being aware that "a transfer in consideration of marriage would not be a true gift since it would be based upon a valuable consideration," deliberately adopted language with intent to close the door against "this method of escaping tax upon a transfer of property," even though the transfer, as concededly in the instant case, may not have been animated by a tax-saving motive. The treasury regulations were regarded as correctly interpreting the law; and, as so construed, section 503 was held, contrary to the contention of the petitioner, not to be violative of the Fifth Amendment to the Federal Constitution.

A further reason for rejecting the petitioner's claim for refund was found by the tax court in petitioner's failure to prove the actual value of his wife's interest under the trusts established by her first husband. Passing comment was made, moreover, that the interest in the trust estate surrendered by Mrs. More upon her

[2] ART. 1. * * * The tax is not limited in its imposition to transfers of property without a valuable consideration, which at common law are treated as gifts, but extends to sales and exchanges for less than an adequate and full consideration in money or money's worth (See Article 8). * * *

ART. 8. Transfers reached by the statute are not confined to those only which, being without a valuable consideration, accord with the common law concept of gifts but embrace as well sales, exchange, and other dispositions of property for a consideration in money or money's worth to the extent that the value of the property transferred by the donor exceeds the value of the consideration given therefor. * * * A consideration not reducible to a money value, as love and affection, promise of marriage, etc., is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gifts.

marriage to petitioner inured entirely to the benefit of her infant son.

Inasmuch as we are not in accord with the decision of the tax court, due deference has caused our somewhat detailed narrative of its rounded viewpoint. To our thinking, the correct basis of decision here is simple. The record reveals in actuality no semblance of a premarriage gift of stock by the petitioner to his affianced. She bargained with him at arm's length before she cut herself off by remarriage from her interest in the trust estate created by her first husband. She sustained a very real and
78 substantial detriment as the consideration for her promise to marry the petitioner. This detriment was definitely measurable in money or money's worth. The circumstances that the money detriment which she sustained did not move to the benefit of petitioner except in the acquisition of the lady of his choice as wife does not lessen the business-like nature of the transaction. The tax court itself found no evidence of an actual donative intent upon the part of petitioner in transferring the stock.

We do not read section 503 of the revenue act as requiring its application to a case where a detriment, measurable in money or money's worth, suffered by the transferee does not inure to the benefit of the transferor in money or money's worth. True it is that Congress could tax a transfer whether or not made with donative intent; but when section 503 is construed as supplementary to section 501, as the tax court construed it and as we think it should be construed, the donative intent must exist in order to subject the transfer of the property to taxation as a gift. If Article 8 of Regulation 79 be interpreted as extending gift tax liability beyond the plain language of the statute, reenactments of the statute do not constitute an adoption by Congress of the administrative construction. See Busey, Collector of Internal Revenue v. Deshler Hotel Co., 130 F. (2d) 187 (C. C. A. 6), for full discussion.

But we do not regard Article 8 of Regulation 79 as applicable to the facts of this case. The transfer of the property involved herein was not for a consideration of a mere promise of marriage; the consideration for the transfer was not only a promise to marry but a concomitant surrender by the transferee of a life income in an existing trust fund.

It is idle to argue that any importance attaches to the fact that Mrs. More forfeited her interest in the trust fund of her first husband when she became Mrs. Wemyss and not when she promised to become Mrs. Wemyss. She kept her promise to become Mrs. Wemyss and thereby incurred the loss of her interest in the trust

fund. The detriment she suffered in money or money's worth was as real when viewed from the one time-point as from the other; and the consideration paid her was as valuable at the one time as at the other.

This case differentiates from those cases in which prospective husbands and wives have entered into prenuptial agreements as to the interest to be acquired by the lady in the property and estate of the gentleman. In these cases the prospective wife was
79 agreeing to surrender only herself to the bonds of matrimony without an accompanying surrender of any property owned by her. She was providing against the exigencies of matrimony by fixing a definite basis for her participation in the property or estate of the man she was about to marry. For example, see Commissioner of Internal Revenue v. Bristol, 121 F. (2d) 129 (C. C. A. 1).

Here the prospective wife was not contracting concerning the subject matter of her interest in the estate of the prospective husband. She was agreeing upon a present transfer made to indemnify her against loss of existing property rights which would ensue in consequence of her remarriage.

Furthermore, the Wemyss transfer is completely disassociated from any indicia of an intent to avoid or reduce death taxes. The minds of the contracting parties at the time of the transfer were obviously upon their future life together and not upon the effect of the transfer in the event of the death of either. In no aspect was the transfer made in contemplation of death.

Authorities pertaining to property settlements in relation to divorce bear no relevancy here and will not be cited or discussed.

This case is sui generis, easily and correctly justiciable upon simple grounds. Manifestly, there was no donative intent in the transfer sought to be taxed as a gift and the transfer itself was not a donative action, within the meaning of section 503 of the Revenue Act or any other sections of the Gift Tax Statute.

In view of our interpretation of section 503 in its relation to the instant controversy, it is unnecessary to consider the argument of petitioner that, should the statute be construed as arbitrarily taxing bona fide transfers for a valuable consideration when not in fact gifts nor intended or capable of being employed to evade the gift tax, the section would be violative of the Fifth Amendment to the Constitution of the United States. Heiner v. Donnan, 285 U. S. 312.

In our judgment, the law does not require that the difference in value between that which petitioner conveyed to his affianced and that which she surrendered in money or money's worth by marrying him be calculated and the excess value taxed under section 503. Compare Herbert Jones v. Commissioner, 1 Tax

Court 1207; Lasker v. Commissioner of Internal Revenue, 138 F. (2d) 989.

What she surrendered in good faith was of quite substantial value in money's worth and was a sufficiently real consider-
80 ation in money's worth to negative a gift-motive concept in the excess in value of the property transferred. We are not in accord with the opinion expressed by the majority of the Court of Appeals for the Ninth Circuit in Commissioner of Internal Revenue v. Greene, 119 F. (2d) 383, 386. We find the reasoning in Lasker v. Commissioner of Internal Revenue, supra, more congenial to our own views. This court has previously expressed, in the language of Judge Hamilton, its concept of the meaning of the word "gift" in the revenue statutes. Commissioner of Internal Revenue v. Montague, 126 F. (2d) 948, 951 (C. C. A. 6).

A donative intent followed by a donative act is essential to constitute a gift; and no strained and artificial construction of a supplementary statute should be indulged to tax as a gift a transfer actually lacking donative intent.

The decision of the Tax Court is reversed.

81 [Clerk's certificate to foregoing transcript omitted in printing.]

82 Supreme Court of the United States

Order allowing certiorari

Filed December 4, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. The case is transferred to the summary docket and assigned for argument immediately following Merrill vs. Fahs, U. S. Collector of Internal Revenue, No. 126.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 49082. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 629. Commissioner of Internal Revenue, Petitioner vs. William H. Wemyss. Petition for a writ of certiorari and exhibit thereto. Filed October 23, 1944. Term No. 629 O. T. 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944

FILE COPY

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	4
Specification of errors to be urged	7
Reasons for granting the writ	8
Conclusion	14

CITATIONS

Cases:	
Commissioner v. *Bristol*, 121 F. 2d 129	10
Commissioner v. *Greene*, 119 F. 2d 383, certiorari denied, 314 U. S. 641	11, 12
Dobson v. *Commissioner*, 320 U. S. 489, rehearing denied, 321 U. S. 231	13
Helvering v. *Rankin*, 295 U. S. 123	14
Lasker v. *Commissioner*, 138 F. 2d 989	12
Levitt & Sons v. *Nunan*, 142 F. 2d 795	14
Merrill v. *Fahs*, No. 126	9
Statutes:	
Revenue Act of 1932, c. 209, 47 Stat. 169:	
Sec. 501	2
Sec. 503	3, 10, 11
Miscellaneous:	
Treasury Regulations 79:	
Art. 1	3, 11
Art. 8	3, 9, 11
Treasury Regulations 103, Sec. 19.22 (b) (3)–1	4

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 629

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

WILLIAM H. WEMYSS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, entered on July 24, 1944, reversing the decision of the Tax Court of the United States.

OPINIONS BELOW

The opinions of the Tax Court (R. 11–24) are reported in 2 T. C. 876. The opinion of the Circuit Court of Appeals (R. 71–77) is reported in 144 F. 2d. 78.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 24, 1944. (R. 71.)

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. May a financial detriment sustained by a transferee from which, however, taxpayer receives nothing of money value to replace the depletion of his estate resulting from the transfer, constitute "consideration" within the meaning of Section 503 of the Revenue Act of 1932?

2. Assuming an affirmative answer to the previous question, is not, in any event, the excess in value of the property which taxpayer transferred above the loss in money value which the transferee sustained, taxable within the meaning of Section 503 of the Revenue Act of 1932?

3. Did the transfer from taxpayer to his prospective wife constitute a gift within the meaning of Sections 501 and 503 of the Revenue Act of 1932?

4. Did the Circuit Court of Appeals, in ruling that taxpayer lacked donative intent, assume the function of the Tax Court by making a finding of fact either contrary to or not found by the Tax Court?

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 501. IMPOSITION OF TAX.

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as

provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

* * * * *

SEC. 503. TRANSFER FOR LESS THAN ADEQUATE AND FULL CONSIDERATION.

Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this title, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

Treasury Regulations 79 (1936 ed.):

ARTICLE 1. *Imposition of tax.*— * * * The tax is not limited in its imposition to transfers of property without a valuable consideration, which at common law are treated as gifts, but extends to sales and exchanges for less than an adequate and full consideration in money or money's worth. (See article 8.) The statute taxes all such transfers of property made during the calendar year 1932 (after June 6, 1932, the date of the enactment of the Revenue Act of 1932) and each calendar year thereafter (other than gifts specified in subsection (b) of section 504) to the extent that they are donative in character * * *.

ARTICLE 8. *Transfers for a consideration in money or money's worth.*—Trans-

fers reached by the statute are not confined to those only which, being without a valuable consideration, accord with the common law concept of gifts, but embrace as well sales, exchanges, and other dispositions of property for a consideration in money or money's worth to the extent that the value of the property transferred by the donor exceeds the value of the consideration given therefor. However, a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth. A consideration not reducible to a money value, as love and affection, promise of marriage, etc., is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift.

Treasury Regulations 103, promulgated under the Internal Revenue Code:

> SEC. 19.22 (b) (3)–1. *Gifts and bequests.*— * * * An amount of principal paid under a marriage settlement is a gift. * * *

STATEMENT

Some time prior to May 24, 1939, taxpayer, a widower, proposed marriage to Ellen Stokes More, a widow. She was the recipient of the income for life under trusts created by her first

husband for the benefit of herself and infant son by her first marriage. (R. 12–13.) However, in the event of remarriage she lost her income in these trusts, which would then inure entirely for the benefit of her son. (R. 13, 21.) Mrs. More told taxpayer she would not be willing to marry him and lose her life income under these trusts created by her first husband unless he would enter into an antenuptial contract with her to make good the loss, and on May 24, 1939, they entered into such an agreement in writing. (R. 13.) This writing recited that Mrs. More "has promised to marry" taxpayer on June 20, 1939; that upon consummation of the marriage she "will be deprived of a large monthly income"; and that it was the desire of taxpayer "to compensate said Ellen Stokes More for her aforesaid loss and to provide for and maintain her so long as she may live in keeping with her station in life"; and that for these reasons taxpayer had that day transferred 13,139 shares of the common stock of the General Shoe Corporation to her. (R. 14.) This contract was prepared by Mrs. More's father, who was an attorney. (R. 30.) On the same day taxpayer transferred the shares to Mrs. More and approximately a month later the marriage took place. (R. 15.) On the wedding day and immediately following the marriage, taxpayer executed a will providing an estate for life or widowhood for his wife in a certain farm and

a trust for her benefit of one-third of his estate, less the value of 11,139 shares of common stock of General Shoe Corporation. (R. 15.) The income which she had been receiving under the trust created by her first husband ceased for her own use and was thereafter paid for the benefit of her infant son. (R. 15, 21.)

The Commissioner determined that the transfer of the 13,139 shares was not made for a consideration in money or money's worth and that the transfer constituted a gift of an amount equal to the value of the stock, which he found to be $149,456.13. (R. 15.) In addition to contending that there was no gift within the meaning of the statute, taxpayer urged that the value of the annuity which Mrs. More surrendered was $77,500 and therefore that the gift could not exceed the difference between that amount and the value of the stock, or $71,956.13. (R. 17.)

The Tax Court found that the only consideration received by taxpayer for the transfer of the stock was the promise of marriage and that pursuant to Article 8 of Treasury Regulations 79 it must be disregarded. (R. 18.) The Tax Court held that even if it be assumed that the loss by Mrs. More of the income of the trusts was a consideration for the transfer of the stock rather than a mere consequence of the marriage, taxpayer's contention must fail because (a) he did not receive the income of the trusts nor acquire any

right to them, and (b) the actual value of Mrs. More's interest under the trusts was not proved. (R. 21.) The Tax Court also noted that the interest in the trust estate surrendered by Mrs. More upon her marriage to taxpayer inured entirely to the benefit of her infant son. (R. 21–22.) Accordingly, the Tax Court sustained the determination of deficiencies. Upon review by the entire Tax Court, Judge Disney alone dissented, solely because of the "financial detriment suffered by the wife-to-be, as a consideration which in my opinion the law requires us to take into account" (R. 24), stating, however (R. 23):

> Of course, the fact that it may not have represented full and adequate consideration goes only to the amount to be deemed gift.

The court below reversed the decision of the Tax Court and held that no tax whatsoever was due (R. 71–77).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the financial detriment sustained by the transferee, from which the estate of taxpayer derived no financial benefit, constituted consideration within the meaning of Section 503 of the Revenue Act of 1932.

2. In holding that the excess in money value between property which taxpayer conveyed to his prospective wife and the detriment which she sus-

tained upon becoming his wife, need not be calculated, under Section 503 of the Revenue Act of 1932.

3. In holding that the excess in money value between property which taxpayer conveyed to his prospective wife and the detriment which she sustained upon becoming his wife, is not taxable under Section 503 of the Revenue Act of 1932.

4. In holding immaterial the ruling of the Tax Court that taxpayer had failed to prove the actual money value of his prospective wife's interest in the trust income which she surrendered upon her marriage.

5. In holding that the transfer by taxpayer to his wife was not a gift within the meaning of Sections 501 and 503 of the Revenue Act of 1932.

6. In assuming jurisdiction itself to make a finding of fact of lack of donative intent on the part of taxpayer, which the Tax Court either had not made below or had found to the contrary.

7. In reversing the decision of the Tax Court.

REASONS FOR GRANTING THE WRIT

The questions presented are of importance in the administration of the tax laws; there is conflict with respect to them between different Circuit Courts of Appeals; similar cases involving the present issues are likely to be decided differently in the future by the several Circuit Courts of Appeals; and the decision of the court below is believed to be erroneous. Moreover, the case of

Merrill v. *Fahs*, No. 126, this term, in which the Court granted a petition for certiorari on October 9, 1944, raises analogous questions, and a decision in this case will serve further to advance the settlement of the law relating to gift taxation of transfers pursuant to antenuptial agreements and possess large usefulness from an administrative standpoint.

(a) The Tax Court held, one judge dissenting on this point, that the only consideration received by taxpayer for the transfer of stock to his prospective wife was the promise of marriage; that under the pertinent regulations,[1] which here were deemed to have received Congressional approval and the force of law, this is wholly to be disregarded. (R. 18.) The Tax Court further held (R. 21):

> Even if it be assumed that the loss by his wife of the income of the trusts was a consideration for the transfer of the stock rather than a mere consequence of the marriage, petitioner's contention must fail because he did not receive the income of the trusts or acquire any right thereto. All that he received was a promise of marriage which, as heretofore pointed out, is not measurable in money or money's worth.

The court below, on the contrary, held (R. 75):

> We do not read section 503 of the revenue act as requiring its application to a case

[1] Regulations 79, Article 8, *supra*, pp. 3–4.

> where a detriment, measurable in money or money's worth, suffered by the transferee does not inure to the benefit of the transferor in money or money's worth.
>
> * * * * *
>
> But we do not regard Article 8 of Regulation 79 as applicable to the facts of this case. The transfer of the property involved herein was not for a consideration of a mere promise of marriage; the consideration for the transfer was not only a promise to marry but a concomitant surrender by the transferee of a life income in an existing trust fund.

This ruling of the Sixth Circuit Court of Appeals, namely, that detriment to the transferee may constitute consideration under Section 503,[2] is in conflict with the holding of the Circuit Court of Appeals for the First Circuit in *Commissioner* v. *Bristol*, 121 F. 2d 129, 133–134, that the purpose of this section is to prevent depletion of the estate of the donor and to require that property involved in a transfer be replaced by property of equal value, so that the transferor's estate will not be reduced without a tax being paid. Thus, in the *Bristol* case, the court said (p. 133):

> "Consideration", as used in Section 503, is not the same as common law consideration; it means that when the transferor gives something away and does not at the same time replace it with money of equal

[2] Revenue Act of 1932, *supra*, pp. 2–3.

> value or some goods or services capable of being evaluated in money, he is deemed to have made a gift within the taxing law.

Again, in *Commissioner* v. *Greene*, 119 F. 2d 383, 385–386, certiorari denied, 314 U. S. 641, the Circuit Court of Appeals for the Ninth Circuit held that the meaning of consideration as used in the statute and regulations[4] is not controlled by local law but, on the contrary, the taxing act treats certain transfers as gifts whether local law deemed them so or not.

(b) On taxpayer's own claim, the value of the property transferred to the prospective wife was almost twice the value of the life interest in the trusts which she surrendered consequent to her marriage. The undisputed value of the stock which taxpayer transferred was $149,456 (R. 15); the present value of the life income which the transferee surrendered was, taxpayer asserted, $77,500 (R. 17). The court below held that the law does not require that the difference in these values be calculated and the excess taxed under Section 503; that what she surrendered was a sufficiently real consideration to negative a gift-motive concept in the excess in value of the property transferred. (R. 76.) In this connection, the court below directly stated that it is "not in accord with the opinion expressed by the majority of the Court of Appeals for the Ninth

[4] Sec. 503, Revenue Act of 1932, and Articles 1 and 8 of Regulations 79, *supra*, pp. 3–4.

Circuit" in *Commissioner* v. *Greene*, 119 F. 2d 383, 386, *supra*, certiorari denied, 314 U. S. 641 and that it found the reasoning of the Circuit Court of Appeals for the Seventh Circuit in *Lasker* v. *Commissioner*, 138 F. 2d 989, "more congenial". (R. 76.) Hence, the court below apparently considered it unnecessary expressly to rule on the holding of the Tax Court that taxpayer had failed in any event to prove the actual value of his wife's interest in the trusts created by her first husband. (R. 21.)

(c) Finally, the court below stated (R. 75, 76):

> The tax court itself found no evidence of an actual donative intent upon the part of petitioner in transferring the stock.
>
> * * * * *
>
> Manifestly, there was no donative intent in the transfer sought to be taxed as a gift and the transfer itself was not a donative action, within the meaning of section 503 of the Revenue Act or any other sections of the Gift Tax Statute.

However, careful examination of the findings and opinion of the Tax Court fails to reveal any finding by the Tax Court that there was "no evidence of an actual donative intent". It is true that the Tax Court nowhere made a distinct finding that there was donative intent. However, certainly it did not find that there was none. On the contrary, implicit throughout the Tax Court's decision, is the fact finding that this was no busi-

ness or arm's length transaction, but rather a family settlement, and that there was donative intent. Thus, the Tax Court notes the lack of monetary value of marriage (R. 18); the discrepancy, amounting to almost $72,000, between the value of the stock transferred by taxpayer and the detriment claimed to have been suffered by the transferee (R. 17); the purpose of the gift tax to prevent evasion of the estate tax by means of premarital gifts, and the gift taxation of the transfer by a wealthy man of a substantial portion of his property to his intended spouse as a reasonable exercise of the power to prevent such evasion (R. 20); the provisions of the taxpayer's will executed on the wedding day (R. 15); and the possibility that maternal instinct prompted Mrs. More to make the agreement which would give her son double assurance of an adequate income for life (R. 21–22). It seems clear that the Tax Court looked upon the transaction as a family arrangement, not a business deal. Certainly, the record contains ample evidence to sustain such a finding, and if made, it is entitled to finality. *Dobson* v. *Commissioner*, 320 U. S. 489, rehearing denied, 321 U. S. 231. Nevertheless, the court below found that the prospective wife bargained at "arm's length" (R. 74), that the transaction was "business-like" in nature (R. 75), that the transfer was completely dissociated from any *indicia* of an intent to avoid

death taxes and that the minds of the contracting parties were not upon the effect of the transfer in the event of the death of either. (R. 76.) Even if the Tax Court may be deemed not to have made a fact finding of the intent of the parties, as donative or otherwise, still it seems clearly to have been error for the court below itself to have made such a finding. If the Circuit Court of Appeals believed that a finding on the subject of donative intent was requisite for decision of the case, it should not have attempted to weigh the evidence itself and make the finding, but should have remanded the case to the trier of the facts. *Helvering* v. *Rankin*, 295 U. S. 123; *Levitt & Sons* v. *Nunan*, 142 F. 2d 795, 798 (C. C. A. 2d).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

OCTOBER 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute and regulations involved	2
Statement	4
Specification of errors to be urged	8
Summary of argument	9
Argument:	
I. The taxed transfer was a gift within the meaning of Sections 501 and 503 of the Revenue Act of 1932 and the Regulations	12
A. The transfer, pursuant to the antenuptial agreement, is "deemed a gift" to the extent that it was not supported by "an adequate and full consideration in money or money's worth"	14
B. Implicit in the decision of the Tax Court is a finding that the transfer was "donative", but if the court below properly considered an express finding to that effect essential, it should have remanded the case to the Tax Court	23
II. Taxpayer failed to prove that he received any adequate and full consideration in money or money's worth for the gift, and accordingly, the entire value of the property transferred is taxable	27
A. Taxpayer failed to prove the value of the consideration	28
B. The detriment suffered by Mrs. More cannot, as a matter of law, constitute "adequate and full consideration in money or money's worth"	33
III. Sections 501 and 503 of the Revenue Act of 1932, as construed by the Tax Court, are constitutional	37
Conclusion	40

623289—44——1

CITATIONS

Cases:

	Page
Archbold v. *Commissioner*, 42 B. T. A. 453	32
Barclay & Co. v. *Edwards*, 267 U. S. 442	38
Commissioner v. *Bristol*, 121 F. 2d 129	22, 34
Commissioner v. *Greene*, 119 F. 2d 383, certiorari denied, 314 U. S. 641	17, 35
Commissioner v. *Montague*, 126 F. 2d 948	13
Commissioner v. *Scottish-American Investment Co.*, decided December 4, 1944	25, 26, 31
Couzens v. *Commissioner*, 11 B. T. A. 1040	30
Dobson v. *Commissioner*, 320 U. S. 489, rehearing denied, 321 U. S. 231	25
Douglas v. *Commissioner*, 322 U. S. 275	17
Fulton Oil Co. v. *Commissioner*, 81 F. 2d 330	26
Glaser v. *Commissioner*, 69 F. 2d 254, certiorari denied, 292 U. S. 654	36
Gray, Estate of v. *Commissioner*, 44 B. T. A. 545	36
Guggenheim v. *Helvering*, 117 F. 2d 469, certiorari denied, 314 U. S. 621	32
Guggenheim v. *Rasquin*, 312 U. S. 254	31
Helvering v. *Amer. Dental Co.*, 318 U. S. 322	21
Helvering v. *City Bank Co.*, 296 U. S. 85, rehearing denied, 296 U. S. 664	38
Helvering v. *Rankin*, 295 U. S. 123	26
Helvering v. *Taylor*, 293 U. S. 507	32
Helvering v. *Winmill*, 305 U. S. 79	17
Housman v. *Commissioner*, 105 F. 2d 973, certiorari denied, 309 U. S. 656	31
Jones v. *Commissioner*, 1 T. C. 1207	22
Lasker v. *Commissioner*, 138 F. 2d 989	22, 23
Latty v. *Commissioner*, 62 F. 2d 952	36
Levitt & Sons v. *Nunan*, 142 F. 2d 795	26
Merrill v. *Fahs*, No. 126, October Term, 1944	22
Nicol v. *Ames*, 173 U. S. 509	38
Robinette v. *Helvering*, 318 U. S. 184	14, 18, 23
Rosenthal v. *Helvering*, 124 F. 2d 474	26
Sanford, Estate of, v. *Commissioner*, 308 U. S. 39	39
Smith v. *Shaughnessy*, 318 U. S. 176	14
Taft v. *Bowers*, 278 U. S. 470	38
Taft v. *Commissioner*, 304 U. S. 351	15, 17, 36
Tyler v. *United States*, 281 U. S. 497	38
United States v. *Hudson*, 299 U. S. 498	38
Universal Steel Co. v. *Commissioner*, 46 F. 2d 908	31

Statutes:	Page
Internal Revenue Code, Sec. 1002 (26 U. S. C. 1002)	17
Revenue Act of 1924, c. 234, 43 Stat. 253, Sec. 320	14, 35
Revenue Act of 1932, c. 209, 47 Stat. 169:	
Sec. 501	2, 14
Sec. 503	3, 15
Miscellaneous:	
H. Rep. No. 708, 72d Cong., 1st Sess., pp. 27–29 (1939–1 Cum. Bull. (Part 2) 457, 476, 477–478)	14, 17, 35
II Paul, *Federal Estate and Gift Taxation:*	
Sec. 16.14	18, 36
Sec. 16.15	18
S. Rep. No. 665, 72d Cong., 1st Sess., p. 41 (1939–1 Cum. Bull. (Part 2) 496, 524, 525)	14, 17
Treasury Regulations 79 (1933 ed.):	
Art. 8	16
Treasury Regulations 79 (1936 ed.):	
Art. 1	3, 15
Art. 8	3, 15, 17, 18
Art. 19, as amended by T. D. 4901, 1939–1 Cum. Bull. 341	30
Treasury Regulations 103, Sec. 19.22 (b) (3)–1	22
Treasury Regulations 108, Sec. 86.8	17

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 629

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

WILLIAM H. WEMYSS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinions in the Tax Court (R. 8–18) are reported in 2 T. C. 876. The opinion of the Circuit Court of Appeals (R. 52–58) is reported in 144 F. 2d 78.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 24, 1944 (R. 52). Petition for a writ of certiorari was filed on October 23, 1944, and granted December 4, 1944 (R. 58). Jurisdiction of this Court rests on Section 240 (a)

of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a transfer by taxpayer to his prospective wife, pursuant to an antenuptial contract, was a gift within the meaning of Sections 501 and 503 of the Revenue Act of 1932 and the applicable Treasury Regulations.

2. If so, whether the value of the gift was the full value of the property, as held by the Tax Court.

3. Whether Sections 501 and 503, if construed as applicable to this transfer, violate the Due Process Clause of the Fifth Amendment.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 501. IMPOSITION OF TAX.
>
> (a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual * * * of property by gift.
>
> (b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; * * *
>
> * * * * *

SEC. 503. TRANSFER FOR LESS THAN ADEQUATE AND FULL CONSIDERATION.

Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this title, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

Treasury Regulations 79 (1936 Ed.):

ART. 1. *Imposition of tax.*— * * * The tax is not limited in its imposition to transfers of property without a valuable consideration, which at common law are treated as gifts, but extends to sales and exchanges for less than an adequate and full consideration in money or money's worth. (See article 8.) * * *

ART. 8. *Transfers for a consideration in money or money's worth.*—Transfers reached by the statute are not confined to those only which, being without a valuable consideration, accord with the common law concept of gifts, but embrace as well sales, exchanges, and other dispositions of property for a consideration in money or money's worth to the extent that the value of the property transferred by the donor exceeds the value of the consideration given therefor. However, a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction

which is bona fide, at arm's length, and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth. A consideration not reducible to a money value, as love and affection, promise of marriage, etc., is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift.

STATEMENT

Sometime prior to May 24, 1939, taxpayer, a widower, then approximately fifty-nine years old (R. 21), proposed marriage to Ellen Stokes More, a widow, forty-four years of age (R. 9, 10). He had two children by his first marriage (R. 9), and she had one child by her first marriage (R. 9). Mrs. More's first husband had set up trusts the income from which was to be paid to her for life for her benefit and that of their infant son. One-half of the income in these trusts was treated as received by Mrs. More for her own use and an equal amount for the benefit of the child. (R. 9–10.) From her husband's death until June 20, 1939 (the date of Mrs. More's marriage to taxpayer), Mrs. More received $29,428.49 for her own use (R. 9–10). In the event of remarriage, she was to lose her part of this trust income, which would then inure entirely to the benefit of her son (R. 9, 11). Mrs. More told taxpayer she would not be willing to marry him and lose her life income under these trusts created

by her first husband unless he would enter into an antenuptial agreement with her to make good the loss, and on May 24, 1939, they entered into the following agreement in writing (R. 10):

> This contract and agreement entered into by and between William H. Wemyss and Ellen Stokes More, both residents of Davidson County, Tennessee:
>
> WITNESSETH THAT:
>
> WHEREAS, the said Ellen Stokes More has promised to marry William H. Wemyss on June 20, 1939; and,
>
> WHEREAS, upon the consummation of said marriage, under the terms of a trust now being administered by the Girard Trust Company of Philadelphia, Pennsylvania, the said Ellen Stokes More will be deprived of a large monthly income; and
>
> WHEREAS, it is the desire and intention of the said William H. Wemyss to compensate said Ellen Stokes More for her aforesaid loss and to provide for and maintain her so long as she may live in keeping with her station in life; and
>
> NOW, THEREFORE, I, William H. Wemyss, have this day transferred in blank and delivered to the said Ellen Stokes More thirteen thousand one hundred and thirty nine (13,139) shares of the common capital stock of the General Shoe Corporation evidenced by the following certificates:

Certificate No.	No. Shares
6,001	472
6,495	231
844	900
840	1,000
839	1,000
837	9,536

In testimony whereof we, William H. Wemyss and Ellen Stokes More, have hereunto affixed our signatures.

This May 24th, 1939.

(Signed) WILLIAM H. WEMYSS
(Signed) ELLEN STOKES MORE

The contract was prepared by Mrs. More's father, who was an attorney (R. 22). On the same day, taxpayer transferred the shares to Mrs. More and less than a month later the marriage took place (R. 11). The undisputed value of the stock which taxpayer transferred to Mrs. More was $149,456.13 (R. 9, 11); while the Tax Court held that taxpayer had failed to prove the value of Mrs. More's life interest in the trusts created by her first husband (R. 15–16), on taxpayer's own claim the present value of her interest in these trusts did not exceed $77,500 (R. 12).

On the wedding day, June 20, 1939, and immediately following the marriage, taxpayer executed a will providing an estate for life or widowhood for his wife in a certain farm and for one-third of his estate, less the value of 11,139 shares of common stock of General Shoe Corporation, to be held in trust for her (R. 11). The day follow-

ing the marriage the antenuptial agreement was recorded in the Registrar's Office of Davidson County, Tennessee (R. 10–11).

The Commissioner determined that the transfer of the 13,139 shares was not made for a consideration in money or money's worth and constituted a gift of an amount equal to the value of the stock, namely, $149,456.13 (R. 11). Deficiencies were assessed for the taxable years 1939 and 1940 in the amount of $12,995.66 and $3,965.20, respectively (R. 9). The 1940 deficiency assessment followed from the increase in "the amount of net gifts for preceding years" (R. 5) consequent upon the 1939 determination.

The Tax Court found that the only consideration received by taxpayer for the transfer of the stock was the promise of marriage. It held that since, pursuant to Section 503 of the Revenue Act of 1932 and Article 8 of Treasury Regulations 79, this was not measurable in money or money's worth, it must be disregarded (R. 13, 14), and that within the meaning of this statute and regulations the entire value of the transfer was taxable as a gift. The Tax Court further held that if it be assumed that the loss by Mrs. More of the income of the trust was a consideration for the transfer of the stock rather than a mere consequence of the marriage, taxpayer's contention must fail because (a) he did not receive the income of the trusts nor acquire any right to it and (b) in any event, the actual value of Mrs. More's interest under the

trusts was not proved (R. 15–16). Finally, Section 503, as construed by the Treasury Regulations, was held, contrary to taxpayer's contention, not to be violative of the Fifth Amendment to the federal Constitution (R. 14–15). Accordingly, the Commissioner's determination was sustained. The decision was reviewed by the entire Tax Court, Judge Disney alone dissenting because of the (R. 18) "financial detriment suffered by the wife-to-be, as a consideration which in my opinion the law requires us to take into account." He did not, however, dispute that the excess in value of the stock transferred constituted a taxable gift (R. 16–18). The court below reversed the decision of the Tax Court and held that no tax whatsoever was due (R. 52–58).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the transfer by taxpayer to his prospective wife was not a gift within the meaning of Sections 501 and 503 of the Revenue Act of 1932.

2. In assuming jurisdiction to make a finding of fact that the transfer was not donative when the Tax Court had not so found and when the facts found by the Tax Court were to the contrary.

3. In holding that the financial detriment sustained by the transferee, from which the estate of taxpayer derived no financial benefit, consti-

tuted consideration within the meaning of Section 503 of the Revenue Act of 1932.

4. In holding that the excess in money value between property which taxpayer conveyed to his prospective wife and the detriment which she sustained upon becoming his wife need not be calculated, under Section 503 of the Revenue Act of 1932.

5. In holding that the excess in money value between property which taxpayer conveyed to his prospective wife and the detriment which she sustained upon becoming his wife is not taxable under Section 503 of the Revenue Act of 1932.

6. In holding immaterial the ruling of the Tax Court that taxpayer had failed to prove the actual money value of his prospective wife's interest in the trust income which she surrendered upon her marriage.

7. In reversing the decision of the Tax Court.

SUMMARY OF ARGUMENT

I

A. The court below improperly construed Sections 501 and 503 of the Revenue Act of 1932. The circumstance that the transfer was made bona fide, pursuant to an enforceable contract at common law, or for consideration of money value, does not preclude a taxable gift, since the gift tax is not confined to transfers of something for nothing. Contrary to the holding of the court

below, Section 503 means that valuable consideration in money's worth does not negative a gift motive to the extent that the value of the property transferred exceeds the value of the consideration. The statute thus contemplates that an antenuptial transfer for less than an adequate and full consideration in money or money's worth shall be deemed a gift to the extent of the amount by which the value of the property transferred exceeds the value of the consideration. Treasury Regulations 79, Article 8, long continued and having the force of law, recognizes the distinction between such transfers and transfers made in the ordinary course of business. Not only was the transaction here not made in the ordinary course of business, but it was not a bargain at all. It was merely a family arrangement. A donative intent is implicit in such arrangements and the only pertinent inquiry is whether the transfer was made for a full and adequate consideration in money or money's worth. To the extent that it was not so made, the excess in value is deemed a gift.

B. Even if the court below was correct in its view that a finding of donative intent is essential, there is implicit in the findings and opinion of the Tax Court its view that this transfer was donative. There is a substantial basis in the evidence for such a view. The court below, consequently, intruded on the province of the Tax Court in

holding to the contrary. In any event, if the Tax Court should have made an express finding as to the donative nature of the transfer, the case should have been remanded to accord to the Tax Court an opportunity to make such a finding.

II

A. The Tax Court correctly ruled that taxpayer failed to prove the money value of his prospective wife's interest under the trusts created by her former husband, namely, the earning power of closely owned stock for the life expectancy of a woman 44 years of age. No adequate proof was offered and readily available proof was not adduced. The Tax Court did not abuse its discretion, as a fact trier, in refusing to base a finding upon speculation and conjecture and without foundation in the evidence.

B. In any event, the loss of trust income cannot, as a matter of law, constitute "adequate and full consideration in money or money's worth" within the meaning of the statute, since the alleged consideration consists of a detriment on the part of transferee without return to taxpayer of any equivalent in money or money's worth. The purpose of this section in the gift tax law and similar language in sections of the federal estate tax law is to prevent the depletion of the transferor's estate, unless the tax is paid on the transfer, by requiring that the transferor receive in exchange something of the same money value.

III

Sections 501 and 503 do not violate the Fifth Amendment to the Constitution. No contention is or could be made that Congress could not constitutionally impose a transfer tax on this transfer. The problem is solely one of classification. Clearly, a transfer to a prospective wife which is not made for an adequate and full consideration in money or money's worth is sufficiently like a common law gift to be classified with such gifts. Congress may adopt a measure reasonably calculated to prevent avoidance of gift and estate taxes. Since the means here adopted are appropriate to the end, the test of validity with respect to due process of law is satisfied.

ARGUMENT

I

THE TAXED TRANSFER WAS A GIFT WITHIN THE MEANING OF SECTIONS 501 AND 503 OF THE REVENUE ACT OF 1932 AND THE REGULATIONS

The court below summarized its understanding of a taxable gift under the revenue laws in the following language (R. 58):

> What she surrendered in good faith was of quite substantial value in money's worth and was a sufficiently real consideration in money's worth to negative a gift-motive concept in the excess in value of the property transferred. * * * This court has previously expressed, in the language of Judge Hamilton, its concept of the meaning

> of the word "gift" in the revenue statutes. *Commissioner of Internal Revenue* v. *Montague*, 126 F. (2d) 948, 951 (C. C. A. 6).

In the *Montague* case, the court below said (p. 951):

> The word "gift" is usually defined as a voluntary transfer of property by one to another without any consideration or compensation therefor. A "gift" is a gratuity and not only does not require consideration, but there can be none. If there is a consideration for the transaction, it is not a gift * * *.

However, in the *Montague* case, the question was whether the transaction was a gift or a payment of a debt, and Section 503 was not discussed. The language chosen by Congress in Section 503 makes plain that a gift can occur even though there is "consideration", and that, contrary to the holding of the court below, the statute means that valuable consideration in money's worth, tendered in good faith, shall, nevertheless, not negative a gift motive to the extent that the value of the property transferred exceeds the value of the consideration.

Moreover, even if its construction of the statute was correct, we contend that the court below erred by usurping the function of the Tax Court in making a finding of fact that the transfer here was a bargain or trade at arm's length free from any donative intent.

623289—44——3

A. *The transfer, pursuant to the antenuptial agreement, is "deemed a gift" to the extent that it was not supported by "an adequate and full consideration in money or money's worth."*—The terms "transfer" and "gift" are used, in Sections 501 and 503 of the Revenue Act of 1932, in their broadest and most comprehensive sense. H. Rep. No. 708, 72d Cong., 1st Sess., p. 27 (1939–1 Cum. Bull. (Part 2) 457, 476); S. Rep. No. 665, 72d Cong., 1st Sess., p. 39 (1939–1 Cum. Bull. (Part 2) 496, 524); cf. *Smith* v. *Shaughnessy*, 318 U. S. 176; *Robinette* v. *Helvering*, 318 U. S. 184. Thus these gift tax provisions are not confined in their application to transfers of something for nothing, for if receipt of consideration by a transferor avoided a gift, as at common law, a ready means would have been afforded for frustration of the tax. Hence, Congress provided not merely that a tax be imposed "upon the transfer * * * of property by gift" (Section 501, Revenue Act of 1932, *supra*, p. 2), but further enacted, in Section 503 of that Act that:[1]

[1] A similar but more limited provision was also contained in the Revenue Act of 1924, c. 234, 43 Stat. 253, Section 320, enacting the first gift tax:

> Where property is sold or exchanged for less than a fair consideration in money or money's worth, then the amount by which the fair market value of the property exceeded the consideration received shall, for the purpose of the tax imposed by section 319, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

> Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this title, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

Thus, the statute plainly contemplates the actuality of a "gift" despite the immediacy of "consideration" of "value"; simultaneously, "gift" and "consideration" may coexist; and though the transfer is one "for" the other, nevertheless, "for the purpose of the tax" the excess in value of the property transferred over such consideration is "deemed" a "gift". Cf. *Taft* v. *Commissioner*, 304 U. S. 351, 355–357. Long standing Treasury Regulations correctly mark out this statutory meaning. Thus, Treasury Regulations 79 explain:

> ART. 1. *Imposition of tax.*— * * * The tax is not limited in its imposition to transfers of property without a valuable consideration, which at common law are treated as gifts, but extends to sales and exchanges for less than an adequate and full consideration in money or money's worth. (See article 8.) * * *
>
> ART. 8. *Transfers for a consideration in money or money's worth.*—Transfers reached by the statute are not confined to those only which, being without a valuable

> consideration, accord with the common law concept of gifts, but embrace as well sales, exchanges, and other dispositions of property for a consideration in money or money's worth to the extent that the value of the property transferred by the donor exceeds the value of the consideration given therefor. However, a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth. A consideration not reducible to a money value, as love and affection, promise of marriage, etc., is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift.

On familiar principles these Treasury Regulations, long continued without substantial change,[2]

---

[2] The language of Article 8 of Treasury Regulations 79, in the 1933 edition, was substantially the same as in the 1936 edition. It then read as follows:

> ART. 8. *Transfers for less than an adequate and full consideration.*—Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration constitutes a gift within the meaning of the statute. If the consideration is not reducible to a money value, as in the case of love and affection, promise of marriage, etc., it is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift. A sale, exchange, or other transfer of property

and applying to an unamended or substantially re-enacted statute, are deemed to have received Congressional approval and have the force of law. *Taft* v. *Commissioner*, 304 U. S. 351, 357; *Helvering* v. *Winmill*, 305 U. S. 79, 83; *Douglas* v. *Commissioner*, 322 U. S. 275, 281–282.[5]

In *Commissioner* v. *Greene*, 119 F. 2d 383, certiorari denied, 314 U. S. 641, with which the court below states that it is not in accord (R. 58), the Ninth Circuit Court of Appeals (at p. 386), held flatly that "donative intention is immaterial, because § 503 of the act in question does not re-

(see article 2) in the ordinary course of business, where the transaction is bona fide and at arm's length and free from any donative intent, shall be considered as made for an adequate and full consideration in money or money's worth.

In Treasury Regulations 108, Section 86.8, interpreting the same statutory language now found in the Internal Revenue Code, Section 1002, the language of the 1936 edition of Treasury Regulations 79, Article 8, is continued without change.

[5] The reports of the Congressional Committees, recommending adoption of the statute, read as follows (H. Rep. No. 708, 72d Cong., 1st Sess., p. 29 (1939–1 Cum. Bull. (Part 2) 457, 477–478); S. Rep. No. 665, 72d Cong., 1st Sess., p. 41 (1939–1 Cum. Bull. (Part 2) 496, 525)):

> Since the tax is designed to reach all transfers to the extent that they are donative, and to exclude any consideration not reducible to money or money's worth, it is provided in this section that where the transfer is made for less than an adequate and full consideration in money or money's worth, the excess in value of the property transferred over such consideration shall be deemed a gift. For example, if A sells property worth $10,000 to B for $1,000, there is a gift of $9,000.

quire it." It is unnecessary, however, for this Court to decide whether or not a donative intent is completely immaterial in all situations. The Treasury, by the authoritative construction contained in its Regulations already quoted, has excluded "bad bargains" made in the ordinary course of business (Article 8, Treasury Regulations 79):

> However, a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth.

In any event, when a transaction is essentially a family settlement and involves no bargain or *quid pro quo*, the statute and regulations assume a gift and do not require express proof of donative intent. Certainly the regulations do not broaden the statute; if anything they limit it.[4] Indeed, this Court in *Robinette* v. *Helvering*, 318 U. S. 184, 187–188, has recently construed, ap-

---

[4] Thus, in II Paul, *Federal Estate and Gift Taxation*, Sec. 16.14, p. 1113, it is stated:

> It is assumed in the regulations that if a transfer is not "made in the ordinary course of business," as defined by the Treasury, the lack of "an adequate and full consideration in money or money's worth" should dispose of any assertion that the transferor lacked donative intent.

For further discussion of the meaning of the statute and Regulations in this connection, see II Paul, *id.* at Sections 16.14–16.15.

plied, and by implication approved Article 8, in holding that a family settlement fell without "the permissive scope of Art. 8 of Regulations 79 (1936 edition)", since it did not constitute a transaction "in the ordinary course of business".

We think it quite clear that the transaction here was a family settlement rather than a bargain or trade. The Tax Court found that the only consideration for the instant transfer was a promise of marriage (R. 13, 14), which, under Article 8 of the Regulations, "is to be wholly disregarded". Moreover, in the language of the Tax Court (R. 15):

> Even if it be assumed that the loss by his wife of the income of the trusts was a consideration for the transfer of the stock rather than a mere consequence of the marriage,

the transaction does not fall within the permissive scope of Article 8, as made in the ordinary course of business, nor—from a broader aspect—is it in any sense an arm's length commercial transaction at all, free from any donative intent—whether within or without the ordinary course of business. The taxpayer did not bargain for a wife, nor did he bargain for the loss of trust income, valued at $77,500, in exchange for his transfer of $149,456.13 worth of stock.

The transfer of the stock was not in payment for either the promise of marriage or the financial detriment incurred as a consequence of marriage.

In the language of the agreement itself, drawn by Mrs. More's father, it was taxpayer's desire "to compensate" her (R. 10) "for her aforesaid loss and to provide for and maintain her so long as she may live in keeping with her station in life;" namely, as his wife. As a consequence of the marriage she would suffer a financial loss. He did not desire this to ensue and he wished to make ample provision for her anyhow; therefore, he gave her approximately twice the value of what she would lose by marriage, but his transfer was not in payment for what she lost any more than it was in payment for her consent to become his wife. Besides, it will be recalled that the trust income was here not, as a matter of fact, lost to the family, but instead of being paid partly to Mrs. More, upon her remarriage inured entirely to her son.

The great disparity between the value of the trust interests surrendered and the value of the stock transferred is, in itself, striking evidence that the transaction was a family settlement, a division of a substantial estate—not a bargain at all. Further confirmation is afforded by the provisions of taxpayer's will executed on the wedding day, wherein he gave Mrs. More an estate for life or widowhood in a farm and one-third of his estate in trust, *allowing, however, for the approximate value of the stock transferred* (R. 11). Hence, the antenuptial agreement was in reality only one step in the entire family set-

tlement and in the eventual distribution of his entire estate.

Since valuable property interests are involved, the agreement, marriage, and will may, indeed, possess an economic or business aspect. However, this is commonly one of the aspects of marriages and wills, which thereby do not become transactions entered into in the ordinary course of business or business transactions at all. Nor is the circumstance that the agreement was drawn by a lawyer significant. Legal advice is customarily obtained where substantial property settlements are involved, and here the lawyer was Mrs. More's father, who might be expected to advise in a family settlement of this character. Again, the circumstances, that she was unwilling to marry him unless he compensated her for the loss of the trust income and that through this transaction taxpayer satisfied a desire for her to become his wife, do not characterize this family settlement as a commercial transaction or a trade (in or out of the ordinary course of business); as this Court has pointed out, in connection with the income tax law, the motives for a gift need not be altruistic or purely generous; indeed they may often be business or selfish. Cf. *Helvering* v. *Amer. Dental Co.*, 318 U. S. 322, 330–331. The Circuit Court of Appeals for the First Circuit characterized a transfer much like that here involved as "a purely business transaction", but nevertheless held it taxable as a gift. *Commissioner* v. *Bristol*, 121 F.

2d 129, 131. Indeed, Treasury Regulations interpreting the income tax provide that the amount of principal paid under a marriage settlement is a gift. Treasury Regulations 103, Sec. 19.22 (b) (3)–1.

In *Merrill* v. *Fahs*, No. 126, this Term, set for hearing at the same time as the instant case, the Fifth Circuit Court of Appeals held a transfer under a similar antenuptial agreement to be taxable as a gift. Situations such as were involved in *Lasker* v. *Commissioner*, 138 F. 2d 989 (C. C. A. 7th), and *Jones* v. *Commissioner*, 1 T. C. 1207, are readily distinguishable. There, a husband and wife were taking steps to secure a divorce and the settlement of the wife's right to support and her property claims against him were at issue. While we think the Regulations were not intended to exclude even that type of transaction, the parties were dealing at arm's length, in a sense, and the purpose to trade may have been said to exist. Thus, in the *Jones* case, the Tax Court expressly differentiated antenuptial agreements such as here involved, and said (p. 1210):

> Moreover in those cases the circumstances are frequently such that there may well be a definite donative intent in the transfer. The contract there may be to effect a mere family arrangement. The parties are manifestly not dealing at arm's length and the purpose to exact a *quid pro quo* may be lacking.

Indeed, in the *Lasker* case, it appears (p. 991) that the court understood that the Commissioner there conceded that the transaction in question was made in the ordinary course of business, at arm's length, within the exception contained in Article 8 of Regulations 79.[3] By contrast, the situation at bar, as already pointed out, bears close analogy to that involved in *Robinette* v. *Helvering*, 318 U. S. 184, 187–188, where, by agreement, mother and daughter executed reciprocal trusts and the stepfather made a similar arrangement by will. There taxpayer's contention that this agreement came within the regulations as an arm's length transaction in the ordinary course of business was overruled by this Court.

B. *Implicit in the decision of the Tax Court is a finding that the transfer was "donative", but if the court below properly considered an express finding to that effect essential, it should have remanded the case to the Tax Court.*—Even if we are wrong in our conclusion, already stated, respecting the correct construction of Section 503, we submit that the court below went beyond its powers in holding that "there was no donative intent in the transfer sought to be taxed as a gift" (R. 57).

Study of the opinion of the Tax Court (R. 8–16) reveals the inaccuracy of saying, as did the court

[3] As a matter of fact, the Government did not intend such a concession.

below (R. 56), that "The tax court itself found no evidence of an actual donative intent upon the part of petitioner in transferring the stock." The Tax Court's holding that the promise to marry was valuable consideration at common law for the antenuptial agreement is certainly not a finding that there was "no evidence of an actual donative intent", for donative intent on the part of the promisee is completely consistent with such a promise. While the Tax Court did not expressly find, for reasons amplified in the preceding section of this brief, that the transfer was made with or without donative intent, there is implicit in its opinion and the facts it did find its view that the transfer was donative. The Tax Court noted the impossibility of valuing marriage in terms of money (R. 13); the discrepancy, amounting to $72,000, between the value of the stock transferred by taxpayer and the detriment suffered by the transferee (R. 12); and that taxpayer's (R. 16)—

> argument that the "detriment" suffered by his wife was consideration for the transfer even though it did not result in any financial gain to him loses much of its force when it is kept in mind that the income, which she would have received under the trusts, inured wholly to her infant son. It may well be, though we make no holding to that effect, that her maternal instinct prompted her to take the step which would

> give him double assurance of an adequate income for life.

Certainly the record contains ample evidence to sustain a finding that the transaction was a family arrangement, made with donative intent, not a business deal or bargain, at arm's length. Such a finding, implicit in the findings and opinion of the Tax Court, is entitled to finality. *Dobson* v. *Commissioner,* 320 U. S. 489, rehearing denied, 321 U. S. 231; *Commissioner* v. *Scottish-American Investment Co.,* decided by this Court, December 4, 1944.

Going beyond its powers in entering into such an inquiry, the court below found that the prospective wife bargained "at arm's length" (R. 56), that the transaction was "business-like" in nature (R. 56), that the consideration for the transfer was not only a promise to marry, as the Tax Court had found (R. 13, 14), but also "a concomitant surrender by the transferee of a life income in an existing trust fund" (R. 56) and that (R. 57)—

> She was agreeing upon a present transfer made to indemnify her against loss of existing property rights which would ensue in consequence of her remarriage.

The court below also chose to infer that the transfer was completely disassociated from any indicia of an intent to avoid death taxes, that the minds of the contracting parties were not upon the effect of the transfer in the event of the death of

either (R. 57), and finally, found that there was no donative intent in the transaction and held that the case was "*sui generis*, easily and correctly justiciable" (R. 57) upon this ground. This was not a necessary inference from the record, and it cannot be said that no other conclusion had substantial basis in the evidence and that a finding of donative purpose could not have been sustained on this record. On the contrary, we urge that a finding of donative intent is implicit in the Tax Court's finding and in the facts found by it and that the evidence supplies a substantial basis for such a finding. But if it be held that the Tax Court failed to make a finding essential for the disposition of the case, it is submitted that it was error for the Circuit Court of Appeals, in the first instance, itself to appraise and weigh the evidence and decide this factual question of intention. Instead, the case should have been remanded to the Tax Court with directions to that tribunal to make a finding of fact as to donative intent. *Helvering* v. *Rankin*, 295 U. S. 123, 131; *Commissioner* v. *Scottish-American Investment Co., supra; Fulton Oil Co.* v. *Commissioner*, 81 F. 2d 330 (C. C. A. 9th); *Rosenthal* v. *Helvering*, 124 F. 2d 474, 477 (C. C. A. 2d); *Levitt & Sons* v. *Nunan*, 142 F. 2d 795, 798 (C. C. A. 2d).

II

TAXPAYER FAILED TO PROVE THAT HE RECEIVED ANY ADEQUATE AND FULL CONSIDERATION IN MONEY OR MONEY'S WORTH FOR THE GIFT, AND, ACCORDINGLY, THE ENTIRE VALUE OF THE PROPERTY TRANSFERRED IS TAXABLE

Since the court below construed the statute as barring taxation of the transfer here involved as a gift, it regarded as unnecessary a calculation of the excess in value between what taxpayer conveyed to his prospective wife and that which she lost in money or money's worth (R. 57). If, however, the transfer was not excluded from Section 503 as a business or arm's length transaction, a determination as to whether any consideration was given for the transfer, and a calculation of the difference between what taxpayer gave and the value of the consideration becomes essential in order that the excess may be taxed. It was the holding of the Tax Court and it is our contention here that the taxpayer failed to prove the value of the alleged consideration; namely, the actual value of the wife's interest under the trust; and that, even if the value of that interest had been established, its loss does not in any event constitute "adequate and full consideration in money or money's worth" within the meaning of Section 503, and the total value of the transferred property is the measure of the gift.

A. *Taxpayer failed to prove the value of the consideration.*—The Tax Court correctly ruled that taxpayer failed to prove the value of his prospective wife's interest under the trusts created by her former husband (R. 15–16). The corpus of these trusts consisted of 670 shares of the capital stock of the Arcade Company, of Nashville, Tennessee (R. 9). Mrs. More was entitled to one-half of the income earned by these trusts from the death of her first husband until her death or remarriage (R. 9). The other half of the income was for the maintenance and support of the child of the marriage (R. 9); upon her remarriage the entire income inured wholly to her infant son (R. 11). Her first husband died on February 9, 1934, and between that date and June 20, 1939, the date of her remarriage to taxpayer, she received a total of $29,428.89 (R. 9–10). This averaged $5,484 a year. Upon the basis solely of this average annual income, Mrs. More's age (44 years) at the time of her marriage to taxpayer, and by use of mortality tables, the taxpayer attempted to establish that the value of the wife's interest in the income of these trusts was $77,500. (R. 12.) The Tax Court found this evidence insufficient as proof of actual value of the wife's interest under the trusts. We submit that on the basis of this evidence the Tax Court not only was not compelled to make a finding as to the value of her interests in the trusts, but that such a finding would have had no substantial basis in the record.

No evidence whatsoever as to the financial condition of the Arcade Company or of the assets owned by it was adduced (R. 16). The value of the wife's interest in the trust income depended exclusively upon the success of the company, since the instruments gave the wife not an annuity for life but merely a part of the income earned by this stock and distributed to the trusts as dividends, and since, under the trust instrument, the Arcade stock could not be sold (R. 33, 43). In fact, this income, for the five years experience proved, varied in some years by as much as 20% (R. 9). There is no assurance at all that the income will continue at the average rate. The dividend policy of the corporation may change by necessity or otherwise. While the actuarial tables may be assumed to afford a sufficient basis for ascertaining her life expectancy, only five years' history of the income of this company certainly afforded no basis at all for a determination of its earning powers for the life expectancy of a woman 44 years of age. Apparently the Arcade Company was a closed corporation in which the wife's first husband, E. L. More, was interested. The nature of the management, its future prospects, its present financial condition, the kind of business it was in, the character of the assets owned by it, the necessity of continued management in the same hands for business success, as well as the sale price of the stock, were all essential factors in determin-

ing the amount and probability of income for any considerable number of years in the future. The dividend policy of the corporation is also a relevant factor. Cf. *Couzens* v. *Commissioner*, 11 B. T. A. 1040, 1172. The issue here is not merely earnings for a brief period, but net worth and permanent dividend-paying capacity. In substance, no evidence was introduced except a mathematical calculation based on uncertain and incomplete facts. The income and dividend history could certainly have been proved for a longer period. Treasury Regulations 79 (1936 ed.), Article 19, as amended by Treasury Decision 4901, 1939–1 Cum. Bull. 341, entitled "Valuation of Property", sets forth the necessary elements to establish the value of a security on the basis of the earning power of stock such as that which formed the corpus of this trust. This regulation provides that where selling price is not available, the basis shall be—

> the company's net worth, earning power, dividend-paying capacity, and all other relevant factors having a bearing upon the value of the stock. Complete financial and other data upon which the donor bases his valuation should be submitted with the return.

While this regulation is directed towards valuing stock which is the subject of a gift, it is no less relevant in determining the value of a right to

receive income arising from the ownership of stock. The same factors must be considered in determining the money's worth of consideration received by a donor from a donee, pursuant to Section 503. The burden of proving the value of the consideration was on the taxpayer. See *Housman* v. *Commissioner,* 105 F. 2d 973 (C. C. A. 2d), certiorari denied, 309 U. S. 656. In *Universal Steel Co.* v. *Commissioner,* 46 F. 2d 908, 909 (C. C. A. 3d), the court said that this burden can be met:

> only by satisfactory proof of error and not by a mathematical calculation in which some of the essential factors are uncertain.

We submit that the factors necessary for a valuation of the alleged consideration are lacking here and that the Tax Court was not required to find that the wife's interest in the trust income had a value of $77,500, or any other amount. Its conclusion that its value had not been established has a substantial basis in the record and must be accepted. *Commissioner* v. *Scottish-American Investment Co., supra.* This is not a case where the Tax Court has followed a wrong theory of valuation (*Guggenheim* v. *Rasquin,* 312 U. S. 254), but a case where the Tax Court has declined to apply a theory of valuation which would determine the value of the wife's interest only if the wife had been entitled to receive $5,484 from the trust each year.

Obviously, moreover, this is not a case where taxpayer made the best showing possible under the circumstances and adduced, to a reasonable extent, all the proof available. On the contrary, it is apparent that readily available proof was not adduced and the Tax Court was entirely correct in ruling that under the circumstances it was not compelled to rely upon speculation and conjecture. *Guggenheim* v. *Helvering*, 117 F. 2d 469 (C. C. A. 2d), certiorari denied, 314 U. S. 621, on which respondent relied below, is therefore, readily distinguishable. So also is *Helvering* v. *Taylor*, 293 U. S. 507, also relied upon by respondent, for in that case no opportunity had been afforded taxpayer to adduce evidence before the Board and to try the case on its merits and on the correct theory; only for that reason was a rehearing deemed necessary.

In *Archbold* v. *Commissioner*, 42 B. T. A. 453, 456, where the taxpayer also claimed to set off consideration received as against a gift, the Board said:

> The record shows the ages of Archbold, his intended wife, and his mother. The record does not show or give data from which may be computed the value in money or money's worth on December 31, 1936, or immediately after the marriage, of Elizabeth's rights in Archbold's estate which she agreed to surrender. *Fish* v. *Helvering*, 75 Fed. (2d) 769, affirming 27 B. T. A.

> 1002. * * * We have no idea of and no way of measuring the value on December 31, 1936, or thereabouts of such surrender as she made in consideration of the transfer of the $10,205.62. We can not say that the petitioner erred in paying the gift tax on the transfer of the $10,205.62.

B. *The detriment suffered by Mrs. More cannot, as a matter of law, constitute "adequate and full consideration in money or money's worth."*—The loss of the wife's interest in the trust income cannot as a matter of law constitute "adequate and full consideration in money or money's worth" within the meaning of Section 503 of the Revenue Act of 1932. The Tax Court found that taxpayer received no property of any sort in the transaction. All that he received was her promise to marry him, which is not measurable in money or money's worth. (R. 13.) As the Tax Court noted, the contention that the detriment suffered by her was consideration for the transfer, even though it did not result in any financial gain to him, loses much of its force when it is kept in mind that the income which she would have received under the trusts was not lost to the family, but after the marriage merely inured wholly to her son, and that thereby she afforded him double assurance of an adequate income for life (R. 16).

But even if this were not true, detriment to the donee is not the kind of consideration referred to

in Section 503. For reasons previously indicated the statute was not concerned with consideration in a common-law sense. Its obvious purpose was to reach certain transfers which by common-law standards might be deemed sales or exchanges, provided the donor had not received an adequate and full consideration in money or money's worth. The meaning of "consideration" in Section 503 is well stated by the First Circuit Court of Appeals in *Commissioner* v. *Bristol,* 121 F. 2d 129, 133–134:

> Section 503, providing that a transfer shall be deemed a gift unless the transferor receives full and adequate *consideration* in money or money's worth, appears to mean that any transfer of property is to be treated as a gift to the extent that the transferor does not receive in return an adequate and full *equivalent* in money or something which can be valued in money. "Consideration", as used in Section 503, is not the same as common law consideration; it means that when the transferor gives something away and does not at the same time replace it with money of equal value or some goods or services capable of being evaluated in money, he is deemed to have made a gift within the taxing law. * * * To our mind, the purpose of this section in the gift tax statute and similar wording in sections of the federal estate tax law was to prevent the depletion of the transferor's or decedent's estate, unless a tax was paid on

the transfer, by requiring that the transferor or decedent receive in exchange something of the same money value.

The meaning of the term is here not to be determined by common law or local law, but from the purpose of the federal legislation. *Commissioner* v. *Greene,* 119 F. 2d 383, 385–386 (C. C. A. 9th), certiorari denied, 314 U. S. 641.

The parallel provision (Section 320) of the 1924 Act, note 1, *supra,* p. 14, seemed to require that the consideration be received by the transferor, since the gift was defined to be "the amount by which the fair market value of the property exceeded the consideration *received*". (Italics supplied.) The present law does not use the word "received" but it does refer to a transfer for less than an adequate consideration in money or money's worth, and there is no indication that Congress meant to exclude transfers that would have been taxed under the Revenue Act of 1924. Rather its purpose was to make the statute as comprehensive as possible. H. Rep. No. 708, 72d Cong., 1st Sess., p. 27 (1939–1 Cum. Bull. (Part 2) 457, 476). A construction of the statute which would permit a transfer to escape the tax merely because the donee suffered a detriment would not serve that purpose. Congress obviously wished to narrow possible exclusions under the phrase "fair consideration in money or money's worth" used in Section 320 of the Revenue Act of 1924, just as it had sought by amendments to the estate tax law

to narrow the class of deductible claims. *Taft* v. *Commissioner*, 304 U. S. 351, 357. To hold that the statute fails to reach transfers which in no way diminish the taxpayer's estate would be inconsistent with the policy of the statute. See II Paul, *Federal Estate and Gift Taxation*, Sec. 16.14, p. 1114, in which the author agrees with this view and urges that the adoption of a contrary view—

> for gift tax purposes would open the way for easy avoidance of the tax, and it is therefore extremely doubtful whether the Supreme Court would ultimately sanction such an interpretation.

Where the purported consideration does not replenish the transferor's estate or grant him any right which he did not possess before, it is not within the meaning of the gift tax law "adequate and full". Compare cases ruling on the meaning of "consideration" in connection with deductible claims under the estate tax. *Taft* v. *Commissioner*, 304 U. S. 351, 357; *Latty* v. *Commissioner*, 62 F. 2d 952, 954 (C. C. A. 6th); *Glaser* v. *Commissioner*, 69 F. 2d 254, 257 (C. C. A. 8th), certiorari denied, 292 U. S. 654; *Estate of Gray* v. *Commissioner*, 44 B. T. A. 545, 548–549. Taxation has often been said to be a practical matter; the primary purpose of the gift tax is to prevent the depletion of the donor's estate unless he receives in exchange something of equivalent money value. The construction adopted by the Tax

Court here is in consonance with this purpose, particularly since the alleged "detriment" was a means by which this mother provided a double income for her son.

III

SECTIONS 501 AND 503 OF THE REVENUE ACT OF 1932, AS CONSTRUED BY THE TAX COURT, ARE CONSTITUTIONAL

In the Tax Court, taxpayer contended that an interpretation of Sections 501 and 503 taxing the transfer in the instant case would violate the Fifth Amendment to the Constitution. The Tax Court overruled this contention (R. 14–15), and the Circuit Court of Appeals, in view of its interpretation of Section 503, found it unnecessary to consider taxpayer's argument that (R. 57)—

> should the statute be construed as arbitrarily taxing bona fide transfers for a valuable consideration when not in fact gifts nor intended or capable of being employed to evade the gift tax, the section would be violative of the Fifth Amendment to the Constitution of the United States. Heiner v. Donnan, 285 U. S. 312.

The petitioner's argument relates solely to the matter of classification. It is not contended that Congress could not constitutionally impose a transfer tax upon the transfer here involved, even if the transaction were one made in the ordinary course of business, and no such contention can

logically be made in view of such decisions as *Nicol* v. *Ames,* 173 U. S. 509, and *United States* v. *Hudson,* 299 U. S. 498. The contention is that the transaction here may not be classified as a gift, and the argument assumes that a prenuptial agreement made for a valuable consideration could not be used for the purpose of avoiding a gift or estate tax, an assumption that cannot logically be made. Moreover, the question is not whether this particular transaction was employed to avoid the tax, but whether Congress, as a means of making effective a tax on gifts and estates, might classify as gifts transfers made pursuant to family arrangements where the transfer was not made for a full and adequate consideration in money or money's worth. Cf. *Taft* v. *Bowers,* 278 U. S. 470; *Helvering* v. *City Bank Co.,* 296 U. S. 85, 90, rehearing denied, 296 U. S. 664; *Tyler* v. *United States,* 281 U. S. 497.

Unless it can be said that the classification is wholly arbitrary and capricious, there is no violation of the Fifth Amendment in making the classification. *Barclay & Co.* v. *Edwards,* 267 U. S. 442. Congress may adopt any measure reasonably calculated to prevent avoidance of the gift and estate tax and the test of validity with respect to the Due Process Clause is merely whether the means adopted are appropriate to the end. Thus, this Court held in *Helvering* v. *City Bank Co., supra* (p. 90):

> A legislative declaration that a status of the taxpayer's creation shall, in the application of the tax, be deemed the equivalent of another status falling normally within the scope of the taxing power, if reasonably requisite to prevent evasion, does not take property without due process. * * *

The Tax Court's application of the statute to the instant controversy does not involve, as often pointed out, the taxing of a commercial transaction, that is, a bargain in or out of the ordinary course of business. The facts at bar present only a family settlement and the distribution of a substantial estate. (See Point I, *supra.*) The record clearly indicates that taxpayer so regarded it, for in drawing his will he took into account the distribution already made to his wife. Unless the tax is imposed upon this transfer, it will escape tax altogether. In language often quoted, this Court has said (*Estate of Sanford* v. *Commissioner,* 308 U. S. 39, 44):

> The gift tax was supplementary to the estate tax. The two are in *pari materia* and must be construed together. *Burnet* v. *Guggenheim, supra,* 286. An important, if not the main, purpose of the gift tax was to prevent or compensate for avoidance of death taxes by taxing the gifts of property *inter vivos* which, but for the gifts, would be subject in its original or converted form to the tax laid upon transfers at death.

Obviously a transfer to a prospective wife which is not made in the ordinary course of business and is not made for an adequate and full consideration in money or money's worth is sufficiently like a common-law gift to be classified with such gifts for tax purposes, particularly when the end in view is to make effective a transfer tax on donative transfers.

CONCLUSION

The decision of the Circuit Court of Appeals for the Sixth Circuit should be reversed and the decision of the Tax Court reinstated.

Respectively submitted.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
HELEN R. CARLOSS,
I. HENRY KUTZ,
Special Assistants to the Attorney General.

DECEMBER 1944.

U. S. GOVERNMENT PRINTING OFFICE : 944

FILE COPY

Office - Supreme Court, U. S.
FILED
NOV 11 1944
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 629.

COMMISSIONER OF INTERNAL REVENUE,
PETITIONER,
VS.
WILLIAM H. WEMYSS, RESPONDENT.

BRIEF IN OPPOSITION TO THE GRANTING OF THE WRIT OF CERTIORARI.

J. W. ALLEN,
Third National Bank Building,
Nashville 3, Tennessee,
CECIL SIMS,
1000 American Trust Building,
Nashville 3, Tennessee,
Attorneys for Respondent.

BASS, BERRY & SIMS,
Of Counsel.

INDEX

I. There Is No Conflict Between the Decision of the Sixth Circuit in the Instant Case and the Decisions of Other Circuit Courts of Appeals in the Cases of Fahs vs. Merrill, 142 F. 2d 651; Commissioner vs. Bristol, 121 F. 2d 129; and Commissioner vs. Greene, 119 F. 2d 283 1

Table of Cases

Commissioner vs. Bristol, 121 F. 2d 129 ..... 1, 3, 6
Commissioner vs. Greene, 119 F. 2d 383 ..... 1, 3
Fahs vs. Merrill, 142 F. 2d 651 ..... 1, 2
Jones vs. Commissioner, 1 Tax Court 1207 ..... 5, 6
Lasker vs. Commissioner, 138 F. 2d 989 5

Statutes

Section 503, Revenue Act of 1932—
Treasury Regulations 79, Articles 1 and 8 3
Treasury Regulations 79, Article 8 4

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 629.

COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

VS.

WILLIAM H. WEMYSS, RESPONDENT.

BRIEF IN OPPOSITION TO THE GRANTING OF THE WRIT OF CERTIORARI.

I.

There is no conflict between the decision of the Sixth Circuit in the instant case and the decisions of other circuit courts of appeals in the cases of Fahs v. Merrill, 142 F. 2d 651; Commissioner v. Bristol, 121 F. 2d 129; and Commissioner v. Greene, 119 F. 2d 383.

This cause involved the surrender of an existing vested property right, to-wit, a life income from certain stocks, in consideration of the transfer which was sought to be taxed as a gift. As stated in the opinion of Martin, C. J.:

"This case differentiates from those cases in which prospective husbands and wives have entered into prenuptial agreements as to the interest to be acquired by the lady in the property and estate of the gentleman. In these cases the prospective wife was agreeing to surrender only herself to the bonds of matrimony without an accompanying surrender of any property owned by her. She was providing against the exigencies of matrimony by fixing a definite basis for her participation in the property or estate of the man she was about to marry. For example, see *Commissioner of Internal Revenue* v. *Bristol*, 121 F. 2d 129 (C. C. A. 1).

"Here the prospective wife was not contracting concerning the subject matter of her interest in the estate of the prospective husband. She was agreeing upon a present transfer made to indemnify her against loss of existing property rights which would ensue in consequence of her remarriage.

"Furthermore, the Wemyss transfer is completely disassociated from any indicia of an intent to avoid or reduce death taxes. The minds of the contracting parties at the time of the transfer were obviously upon their future life together and not upon the effect of the transfer in the event of the death of either. In no aspect was the transfer made in contemplation of death."

Record, pp. 75-76.

In *Fahs* v. *Merrill*, 142 F. 2d, at page 654, this fundamental distinction appears from the following language of the court:

"It will be noted that the agreement of March 7, 1939, which is the recited and actual consideration for the transfer, and which alone purports to relinquish anything on the part of Miss Desmare, was made before she was married, when she had no dower or other right whatever in Merrill's property. It is not a case in which one already a wife sells or relinquishes for a consideration the rights which the law

has given her, whether she relinquishes them to her husband or to another. We may well concede that in such a case she gives a money value for what she gets. Such is *Lasker* v. *Commissioner,* 7 Cir., 138 F. 2d 989."

In the present case the property which Mrs. More surrendered was acquired from a *previous husband,* as distinguished from property which might vest under a future marriage with a *prospective* husband.

Commissioner v. *Bristol,* 121 F. 2d 129, likewise involved only the release of a *prospective* and *contingent* interest in the husband's estate, as distinguished from the surrender of a vested property right given to a widow by a previous husband and presumably taxed at the time of its previous creation.

Commissioner v. *Greene,* 119 F. 2d 383, involved only the question of whether a California statute legally obligated an incompetent mother to support two adult daughters because of their inability to earn a living.

II.

There is no error in the decision of the Sixth Circuit in this cause.

(a) Section 503 of the Revenue Act of 1932 by express language requires only the presence of a consideration capable of being valued in money or money's worth—it does not require the consideration to move to the transferor. It is conceded that the property right surrendered by Mrs. More was (1) a consideration for the transfer, and (2) was capable of valuation in money or money's worth.

(b) Treasury Regulations 79, Articles 1 and 8, by express terms are applicable only where the transfer in-

volves either a sale or exchange of property and the seller receives less than adequate and full consideration in money or money's worth. They are intended to prevent evasion arising from a purported sale or exchange where the real intent was donative in character.

(c) The contract between respondent and Ellen Stokes More was an arm's length transaction. Respondent was sixty-three years old (R. 28). He married first in 1919 and his wife died in 1934, leaving two children. Mrs. More was forty-four years of age (R. 13). She first married in 1925 and her husband died in 1934, leaving a son surviving. The contract resulted from mature consideration of these two mature persons, due to a prospective financial loss legally resulting from a second marriage under the provisions of the trust indentures executed by Mrs. More's first husband in 1927 and 1929. It was the result of calm deliberation intended to repair a financial loss. It was executed prior to the marriage and Mrs. More was represented by her father, an attorney, who prepared the contract. After being executed by the contracting parties, it was acknowledged before a notary public and was then registered in the register's office of Davidson County, Tennessee (R. 36-37).

Treasury Regulation 79, Article 8, interpreting Section 503 of the Revenue Act of 1932, contains the following language:

> "However, a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is *bona fide*, at arm's length and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth."

The legal detriment being a consideration reducible to money value, and the tax court having clearly found

facts completely negativing donative intent, under the foregoing treasury regulations the court will not inquire into any possible differences in value but must consider the transfer as having been made for an adequate and full consideration in money or money's worth.

Lasker v. *Commissioner*, 138 F. 2d 989.
Jones v. *Commissioner*, 1 Tax Court 1207.

In *Jones* v. *Commissioner*, 1 Tax Court 1207, the tax court held specifically that any assessable tax was that imposed by authority of section 501. The concluding paragraph of the opinion by Leech, J., is as follows:

> "But aside from that frailty, we think the present transfer was not within the purview of section 503, *supra*. That section can scarcely mean that all arm's length business transactions, involving transfers of property, shall be subjected to scrutiny and, in every case where one party makes a bad bargain, he should have his misfortune increased by the imposition of a gift tax on his unfavorable balance from the transaction. The tax is imposed by authority of section 501. It is expressly limited to transfers 'by gift.' 'Gift' is not defined in the statute. The respondent, however, has himself defined the term as used in the controlling statute as excluding arm's length business transactions, such as is evidenced here, in which there was no donative intent. Regulations 79, Articles 1, 2 and 8, approved October 30, 1933, and articles 1, 2, and 8 of the same regulations, approved February 26, 1936. See *L. W. Mesta*, 42 B. T. A. 933; reversed, 123 F. 2d 986; certiorari denied, 316 U. S. 695; *Walter S. Halliwell, supra*. We think that is correct."
>
> 1 Tax Court, p. 1212.

It was further argued by the respondent (in the above case) that no value was established for the wife's right to maintenance and support in satisfaction of which the transfer in question was made. It was insisted that, in

the absence of specific proof as to the value of the wife's right, the entire transfer was taxable. This contention was rejected.

> "Again we do not agree. The very fact that the attorneys representing petitioner's wife in dealing at arm's length with his attorneys were able to exact a payment of $222,643 in settlement of his obligation is persuasive evidence to us of the value of her right. The amount which the court, in the absence of the agreement, would have been called upon to award to petitioner's wife from his estate would have been based upon his income and the station in life in which he would reasonably be required to maintain his wife. The net income of petitioner for the 10 consecutive years ending with that in which the settlement occurred, averaged $110,000 for each year. At the time the settlement was effected, his income was increasing and the amount paid was little more than his net income for the current year. Thus, not only was the contested payment made as a result of a settlement negotiated at arm's length in which an adequate consideration will be presumed (*Commissioner* v. *Mesta*, 123 F. 2d 936), but the record affirmatively indicates that the settlement was financially favorable to petitioner. See *Young* v. *Young*, 323 Ill. 608, 155 N. E. 405; *Rice* v. *Rice*, 256 Mich. 287, 239 N. W. 256; *Miller* v. *Miller*, 90 Ind. App. 359, 168 N. E. 881; *Owens* v. *Owens*, 20 Ohio App. 518, 152 N. E. 767; *Harden* v. *Harden*, 77 Pac. 2d 721 (Okla.)."
>
> 1 Tax Court, pp. 1211-1212.

(d) It should be noted that *Commissioner* v. *Bristol*, 121 F. 2d 129, relied on by petitioner, has been expressly repudiated by the tax court, and that the principle contended for therein has been recently repudiated by the Circuit Court of Appeals for the Second Circuit, as appears from the following quotation from *Jones* v. *Commissioner*, 1 Tax Court 1207:

"On review, our decision there was reversed. *Commissioner* v. *Bristol, supra.* We have not, however, departed from the view expressed in our opinion in that case. Moreover, the comparatively recent decision by the Second Circuit in *Commissioner* v. *Beck's Estate*, 129 F. 2d 243 (42-2, U. S. T. C., Par. 10195), is especially significant. In that case it was urged that the estate and gift tax provisions of the statute, being complementary, should be integrated for purposes of construction. Similarly rejecting this theory the court held that these provisions, though complementary, were separate and distinct in themselves and that the silence of Congress in its failure to require the integration of their provisions was 'strident.' "

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

J. W. ALLEN,
CECIL SIMS,
Attorneys for Respondent.

BASS, BERRY & SIMS,
Of Counsel.

FILE COPY

Office - Supreme Court, U. S.
FILED
JAN 6 1945
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 629.

COMMISSIONER OF INTERNAL REVENUE,
PETITIONER,

VS.

WILLIAM H. WEMYSS, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT.

J. W. ALLEN,
Third National Bank Building,
Nashville 3, Tennessee,

CECIL SIMS,
1000 American Trust Building,
Nashville 3, Tennessee,
Attorneys for Respondent.

BASS, BERRY & SIMS,
Of Counsel.

SUBJECT INDEX

The Facts 1
Opinion of the Circuit Court of Appeals 4

Brief and Argument—

Summary statement 7

Argument—

I. The tax is levied only upon gifts 10

II. Section 503 levies no additional tax 12

III. Congress cannot tax as a gift that which is not a gift by calling it such 16

IV. The transaction was at arm's length 19

V. Meaning of "consideration" 25

VI. Proof of value 28

Conclusion 33

Citations

CASES

Bromley vs. McCaughn, 280 U. S. 124 ..... 7, 11
Burnett vs. Guggenheim, 288 U. S. 280 ..... 7, 11
Carney vs. Benz, 90 F. 2d 247 9
Commissioner vs. Bryn Mawr Trust Co., 87 F. 2d 605 9
Commissioner vs. Marshall, 125 F. 2d 943 ..... 9, 31-32
Commissioner vs. Wragg, 141 F. 2d 648 28
Federal Trade Commission vs. Bunte Bros., 321 U. S. 349 10
Gregory vs. Helvering, 293 U. S. 465 34
Guggenheim vs. Helvering, 117 F. 2d 439 ..... 9, 30-31
Guggenheim vs. Pasquin, 312 U. S. 254 9
Heiner vs. Donnan, 285 U. S. 312 ..... 8, 17

Helvering vs. City Bank Farmers Trust Co., 296 U. S. 85 ..... 7, 18-19
Helvering vs. Taylor, 293 U. S. 507 ..... 9, 32-33
Hendrick vs. Lindsay, 3 Otto 143 ..... 9, 25
Hoeper vs. Tax Commission, 284 U. S. 206 17
Ithaca Trust Co., Exr., vs. United States, 279 U. S. 151 9
Jones vs. Commissioner, 1 Tax Court 1207 ..... 8, 20, 21, 22, 23
Lasker vs. Commissioner, 138 F. 2d 989 ..... 8, 20, 29
Merrill vs. Fahs (No. 126 in this Court) 4
Porter vs. Commissioner, 60 F. 2d 673, 288 U. S. 436 ..... 9, 26
Smietanka vs. First Trust & Savings Bank, 257 U. S. 602 ..... 9, 13
Taft vs. Commissioner, 92 F. 2d 667 ..... 9, 27-28
United States vs. Merriam, 263 U. S. 179 ..... 9, 12
United States vs. Mitchell, 74 F. 2d 571 9

STATUTES

Revenue Act of 1924, Section 319 10
Revenue Act of 1924, Section 320 ..... 14, 26
Revenue Act of 1926 ..... 17, 18
Revenue Act of 1932, Section 501 ..... 7, 10, 11, 12, 13, 15
Revenue Act of 1932, Section 503 ..... 7, 8, 9, 12, 13, 14, 15, 16, 19, 20, 25, 26
Revenue Act of 1932, Section 506 14
Code of Tennessee, Section 8358 24

MISCELLANEOUS

House Report No. 708, 72nd Congress, 1st Session, p. 29 ..... 7, 15
Paul, Federal Estate and Gift Taxation, Vol. 2, Sec. 16.14, p. 1114 26
Senate Report No. 665, 72nd Congress, 1st Session, p. 41 ..... 7, 15
Treasury Regulations 79, Article 8 ..... 8, 20-21
Treasury Regulations 29, Table A 29

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 629.

COMMISSIONER OF INTERNAL REVENUE,
PETITIONER,

VS.

WILLIAM H. WEMYSS, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT.

THE FACTS.

There is no dispute about the facts. Respondent Wemyss was a widower sixty-three years of age. He married Ellen Stokes More, a widow, on June 20, 1939. Mrs. More's former husband, E. L. More, died on February 9, 1934, leaving one son surviving. On June 6, 1927, and June 15, 1929, E. L. More executed certain trust inden-

tures to Nashville Trust Company creating trusts under the provisions of which upon his death the income from certain corporate stocks was payable to his widow, Ellen Stokes More, during her lifetime or *until her remarriage* (R. 23-24). When respondent Wemyss proposed marriage to Mrs. More she was unwilling and would not agree to marry respondent and thereby suffer the loss of her life income under the trusts created by her deceased husband unless respondent would contract with her to make good the loss. This agreement was required as a condition precedent to her consent to marry respondent.

The Tax Court made the following specific findings of fact:

> "Some time prior to May 24, 1939, petitioner made a proposal of marriage to Ellen Stokes More. She told him she would not be willing to marry him and lose her life income under the trusts created by her first husband unless he would enter into a pre-marriage contract with her to make good the loss."
> Record p. 10.

Mrs. More and respondent agreed on the final terms of the contract after discussing the number of shares of General Shoe Corporation stock which would be required to compensate Mrs. More for her financial loss resulting from her marriage to respondent. This appears from the following cross examination of respondent:

> "Q. When you were discussing with Mrs. More the proposed marriage, did she request you to transfer to her any particular assets or money of any particular value?
> A. Well, my assets were all in the form of General Shoe stock, so it had to be—
> Q. Did she ask that you agree to transfer to her any particular number of shares?

A. We discussed that and agreed on it.

Q. You mean she suggested a certain number?

A. Yes, sir.

Q. And you suggested a certain number?

A. Yes, sir. She suggested a given number.

Q. How did it happen that the number came out to be an odd number like No. 13189?

A. The certificate is written up that way.

Q. You mean you had decided on a number close to that amount?

A. Yes, sir.

Q. At the time you were discussing the proposed marriage, were you familiar with the provisions of the two trust instruments which have been introduced in evidence?

A. Oh, yes.

Q. Did you have any knowledge of the amount of income that had been accruing to Mrs. More from that source?

A. Yes, sir."

Record p. 25.

It was a part of the agreement that the contract be consummated and the stock in question transferred to Mrs. More prior to the marriage (R. 22). The contract was reduced to writing and was executed by both parties on May 24, 1939, and was duly acknowledged for registration before a notary public (R. 22). Respondent transferred the stock pursuant to the contractual obligation to Mrs. More *before the marriage*, on May 24, 1939, and the marriage took place on June 20, 1939. The parties caused the written contract to be recorded on June 21, 1939, in the Register's Office of Davidson County, Tennessee, where the parties resided (R. 27). Mrs. More was forty-four years of age at the time of her marriage to respondent (R. 22). The income accruing to her individually by rea-

son of this trust had averaged $5,484 per year, or approximately $457 per month, since the inception of the trust (Petitioner's Exhibit 4, R. 49).

OPINION OF THE CIRCUIT COURT OF APPEALS.

The basis of the opinion of the Circuit Court of Appeals for the Sixth Circuit in concluding that the transfer of the stock was not subject to the gift tax will appear from the following quotation from its opinion:

> "* * * The record reveals in actuality no semblance of a premarriage gift of stock by the petitioner to his affianced. She bargained with him at arm's length before she cut herself off by remarriage from her interest in the trust estate created by her first husband. She sustained a very real and substantial detriment as the consideration for her promise to marry the petitioner. This detriment was definitely measurable in money or money's worth. The circumstances that the money detriment which she sustained did not move to the benefit of petitioner except in the acquisition of the lady of his choice as wife does not lessen the business-like nature of the transaction. The tax court itself found no evidence of an actual donative intent upon the part of petitioner in transferring the stock."
>
> Record p. 56.

The court distinguished the present case from that of *Merrill* v. *Fahs, Collector*, No. 126, in this Court, as follows:

> "This case differentiates from those cases in which prospective husbands and wives have entered into prenuptial agreements as to the interest to be acquired by the lady in the property and estate of the gentleman. In these cases the prospective wife was agreeing to surrender only herself to the bonds of matrimony without an accompanying surrender of

any property owned by her. She was providing against the exigencies of matrimony by fixing a definite basis for her participation in the property or estate of the man she was about to marry. For example, see *Commissioner of Internal Revenue* v. *Bristol,* 121 F. 2d 129 (C. C. A. 1).

"Here the prospective wife was not contracting concerning the subject matter of her interest in the estate of the prospective husband. She was agreeing upon a present transfer made to indemnify her against loss of existing property rights which would ensue in consequence of her remarriage.

"Furthermore, the Wemyss transfer is completely disassociated from any indicia of an intent to avoid or reduce death taxes. The minds of the contracting parties at the time of the transfer were obviously upon their future life together and not upon the effect of the transfer in the event of the death of either. In no respect was the transfer made in contemplation of death."

Record p. 57.

In response to the Commissioner's insistence that a tax should be imposed upon the difference in values between the vested income surrendered by Mrs. More and the stock transferred to her by respondent, the Circuit Court of Appeals said:

"In our judgment, the law does not require that the difference in value between that which petitioner conveyed to his affianced and that which she surrendered in money or money's worth by marrying him be calculated and the excess value taxed under section 503. Compare *Herbert Jones* v. *Commissioner,* 1 Tax Court 1207; *Lasker* v. *Commissioner of Internal Revenue,* 138 F. 2d 989.

"What she surrendered in good faith was of quite substantial value in money's worth and was a sufficiently real consideration in money's worth to negative a gift-motive concept in the excess in value of the property transferred. * * *

"A donative intent followed by a donative act is essential to constitute a gift; and no strained and artificial construction of a supplementary statute should be indulged to tax as a gift a transfer actually lacking donative intent."

Record pp. 57-58.

BRIEF AND ARGUMENT.

Summary Statement.

The following is a summary statement of respondent's argument:

1. Section 501 of the Revenue Act of 1932 levies an excise upon the transfer of property by gift. No tax is levied upon any transfer unless it amounts in fact and in law to a substantive gift. The statute has been construed and so limited by express decisions of this Court.

Bromley v. *McCaughn*, 280 U. S. 124.

Burnett v. *Guggenheim*, 288 U. S. 280.

2. Section 503 of the Revenue Act of 1932 levies no tax in addition to the excise created by Section 501. Its obvious purpose is to prevent evasions of the tax created by Section 501 by declaring the difference in values taxable as a gift where property is sold or transferred for a consideration in money or money's worth and an inadequate consideration is received by the transferor. The legislative history of Section 503 discloses that its intended application was illustrated in the House and Senate Reports as follows:

> "For example, if A sells property worth $10,000 to B for $1,000, there is a gift of $9,000."
>
> House Report No. 708, 72nd Congress, 1st Session, p. 29.
>
> Senate Report No. 665, 72nd Congress, 1st Session, p. 41.

3. If Section 503 of the Revenue Act of 1932 is construed so as to require the payment of a gift tax upon transactions which are not gifts in substance, the statute

as so construed and applied would violate the Fifth Amendment of the Constitution of the United States. Congress cannot tax as a gift that which is not a gift by calling it such.

Heiner v. *Donnan*, 285 U. S. 312.
Helvering v. *City Bank Farmers Trust Co.*, 296 U. S. 85.

4. The contract between respondent and Mrs. More was an arm's length transaction and was not taxable under Treasury Regulations 79, Article 8, interpreting Section 503 of the Revenue Act of 1932. Under these regulations a transaction which is *bona fide*, at arm's length, and free from any donative intent, is considered as made for an adequate and full consideration in money or money's worth in the ordinary course of business, and is excluded from Section 503. All of these elements exist in the present case.

Lasker v. *Commissioner*, 138 F. 2d 989.
Jones v. *Commissioner*, 1 Tax Court 1207.

5. If Section 503 of the Revenue Act of 1932 is applicable to the present case the surrender by Mrs. More of a vested interest in a life income was an adequate and full consideration in money or money's worth for the transfer of the corporate stock to her by respondent. The statute does not require that the consideration be received by the transferor; it merely provides for the existence of a consideration capable of being appraised in money or money's worth. A detriment is sufficient consideration to support a contractual obligation and if the detriment be capable of valuation in money or money's worth it meets the express requirements of Section 503 of the Revenue Act of 1932. If the language of a taxing statute is doubtful, the doubt must be resolved against the government and in favor of the taxpayer. Similar language relating to deductions

from the estate tax has been generally construed by the courts in accordance with respondent's insistence.

Hendrick v. *Lindsay*, 3 Otto 143.
Smietanka v. *First Trust & Savings Bank*, 257 U. S. 602.
U. S. v. *Merriam*, 263 U. S. 179.
Taft v. *Commissioner*, 92 F. 2d 667.
U. S. v. *Mitchell*, 74 F. 2d 571.
Porter v. *Commissioner*, 60 F. 2d 673.
Commissioner v. *Bryn Mawr Trust Co.*, 87 F. 2d 605.
Carney v. *Benz*, 90 F. 2d 247.

6. If section 503 of the Revenue Act of 1932, is applicable and requires the payment of a gift tax computed on the difference in values, respondent insists that there is ample evidence in the record to ascertain the value of the life income surrendered by Mrs. More. On the other hand, if additional evidence is required or deemed desirable the cause should be remanded to the tax court for the production of such evidence.

Ithaca Trust Co., Exr., v. *U. S.*, 279 U. S. 151.
Guggenheim v. *Helvering*, 117 F. 2d 469.
Commissioner v. *Marshall*, 125 F. 2d 943.
Helvering v. *Taylor*, 293 U. S. 507.
Guggenheim v. *Rasquin*, 312 U. S. 254.

ARGUMENT.

I.

The Tax Is Levied Only upon Gifts.

Section 501(a) of the Revenue Act of 1932, is as follows:

> "For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in Section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or non-resident, of property by gift."

By the foregoing section the tax is levied only upon "the transfer * * * of property by gift." The right to make a gift is but one of the many incidents of the ownership of property. The question presented in the present case is not whether Congress had the power to levy an excise tax upon the transfer of property in the consideration of marriage, or whether it had the power to tax a transfer where the consideration was the surrender of property not accruing to the transferor but amounting to a legal detriment to the transferee. In the language of Mr. Justice Frankfurter:

> "This case presents the narrow question of what Congress did, not what it could do."
>
> *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349.

The gift tax was first enacted in 1924. In construing the nature and extent of the tax imposed by the language "the transfer by * * * gift" (Section 319 of the Revenue Act of 1924), this Court expressly held that the tax was levied upon the single incident of the right to transfer property to another as a gift, pointing out at the same time that all of the other rights and powers incident to the ownership of property were free of the tax.

"It is a tax laid only upon the exercise of a single one of those powers incident to ownership, the power to give the property owned to another. Under this statute all the other rights and powers which collectively constitute property or ownership may be fully enjoyed free of the tax."

Bromley v. *McCaughn*, 280 U. S. 124.

In a subsequent case this Court pointed out that the statute was aimed only at transfers of title having the quality of a gift.

"The statute is not aimed at every transfer of the legal title without consideration. Such a transfer there would be if the Trustees were to hold for the use of the grantor. It is aimed at transfers of the title that have the quality of a gift, and a gift is not consummate until put beyond recall."

Burnett v. *Guggenheim*, 288 U. S. 280.

Respondent therefore had the right to sell or transfer his stock in any manner he saw fit without incurring any liability for the gift tax except in the single instance where the transfer was by way of gift. The legal concept of a transfer by gift is clearly defined. It is a voluntary transfer without consideration.

Petitioner apparently concedes that the transfer here involved is not taxable under the excise levied by Section 501 for the reason that there was no transfer by gift. The Tax Court found that no taxable gift was made under Section 501, saying:

"We agree with petitioner's contention that the agreement to marry constituted valuable consideration for the transfer. *Prewit* v. *Wilson*, 103 U. S. 22; *Barnum* v. *LeMaster*, 110 Tenn. 638, 75 S. W. 1045; hence no taxable gift was made if only section 501(a), *supra*, be considered. We pass at once, therefore to the other contentions of the parties."

Record p. 11.

II.

Section 503 Levies No Additional Tax.

Section 503 of the Revenue Act of 1932, levies no tax in addition to the excise created by Section 501. Section 503 of the Revenue Act of 1932, is as follows:

> "*Transfer for Less than Adequate and Full Consideration.*—Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this title, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year."

The language of the above section manifestly is intended only to prevent evasions of the excise created by Section 501. There is nothing unusual about such legislative devices. It is equally clear, however, that a section designed only to prevent evasions may not be construed so as to extend the class of transactions selected by Congress for taxation. Taxing statutes are not to be extended by implication beyond the clear import of the language used.

> "On behalf of the government it is urged that taxation is a practical matter, and concerns itself with the substance of the thing upon which the tax is imposed, rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer. *Gould* v. *Gould*, 245 U. S. 151, 153, 62 L. Ed. 211, 213, 38 Sup. Ct. Rep. 53. The rule is stated by Lord Cairns in *Partington* v. *Atty. Gen.*, L. R. 4 H. L. 100, 122."
>
> *U. S.* v. *Merriam*, 263 U. S. 179, 187.

The general intention to tax a transaction cannot be enforced by the courts in the absence of language which can be reasonably construed to effect it.

> "* * * It may be that Congress had a general intention to tax all incomes, whether for the benefit of persons living or unborn, but a general intention of this kind must be carried into language which can be reasonably construed to effect it. Otherwise the intention cannot be enforced by the courts. The provisions of such acts are not to be extended by implication. *Treat* v. *White*, 181 U. S. 264, 267, 45 L. Ed. 853, 854, 21 Sup. Ct. Rep. 611; *United States* v. *Field*, 255 U. S. 257, 65 L. Ed. 617, 41 Sup. Ct. Rep. 256; *Gould* v. *Gould*, 245 U. S. 151, 153, 62 L. Ed. 211, 213, 38 Sup. Ct. Rep. 53."
>
> *Smietanka* v. *First Trust & Savings Bank*, 257 U. S. 602, 605-606.

Section 503 by its caption includes only transfers "for less than adequate and full consideration." In the present case it must be conceded that the transfer of the stock was based upon both an *adequate* and a *full* consideration. The words used in Section 503 considered in their customary meaning limit the section to transactions where property is sold or transferred for a consideration in money or money's worth and a difference in values exists. It provides that such difference in values shall "be deemed a gift." Clearly Congress contemplated that persons intending to make a gift but desiring to evade the tax might cloak the transaction as either a sale or exchange of property, and Congress sought to penetrate the subterfuge by declaring that the difference between the values of the property transferred was to be deemed a gift and to that extent taxable under Section 501.

Manifestly Section 503 is inapplicable unless it appears (a) property has been sold or exchanged, (b) the consideration received in the sale was less than the actual

value, or the property received in exchange was less valuable than that transferred, and (c) that to the extent of such difference a donative intent existed.

The legislative history of Section 503 clearly discloses that it should be given this limited construction. This originated in the Revenue Act of 1924 as Section 320 thereof, and was as follows:

> "If the gift is made in property, the fair market value thereof at the date of the gift shall be considered the amount of the gift. Where property is sold or exchanged for less than a fair consideration in money or money's worth, then the amount by which the fair market value of the property exceeded the consideration received shall, for the purpose of the tax imposed by section 319, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year."

When the Revenue Act of 1932 was passed the provisions previously found in Section 320 of the Revenue Act of 1924 were divided into two sections. The first sentence of Section 320 of the Revenue Act of 1924 became a section (Section 506) of the Revenue Act of 1932, reading as follows:

> "If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift."

The remaining language of Section 320 of the Revenue Act of 1924 became Section 503 of the Revenue Act of 1932, the language being changed from:

> "Where property is sold or exchanged for less than a fair consideration in money or money's worth * * *"

to

> "Where property is transferred for less than an adequate and full consideration in money or money's worth * * *."

The word "transferred" was merely substituted as the equivalent of "sold or exchanged," and should be so construed.

The Committees' comments, found in both the Senate and the House Report, relating to the intent and purpose of Section 503, clearly indicate that this section was never intended to broaden the excise, its purpose being merely to "reach all transfers to the extent that they are donative." This explanation was in the following language:

> "Section 503. *Transfers for Less Than Adequate and full Consideration.*—Since the tax is designed to reach all transfers to the extent that they are donative, and to exclude any consideration not reducible to money or money's worth, it is provided in this section that where the transfer is made for less than an adequate and full consideration in money or money's worth, the excess in value of the property transferred over such consideration shall be deemed a gift. For example, if A sells property worth $10,000 to B for $1,000, there is a gift of $9,000."
>
> House Report No. 708, 72nd Congress, First Session, p. 29.
>
> Senate Report No. 665, 72nd Congress, First Session, p. 41.

The example chosen by the Committees to illustrate the application of Section 503 conclusively demonstrates that Congress intended it to prevent *evasions* of Section 501 where transactions donative in purpose were clothed as sales or exchanges of property. Most gifts generally recite that they are made in consideration of love and af-

fection. Congress clearly intended to tax such transfers notwithstanding the statement of such a consideration because they were donative in character.

In the present case respondent transferred the stock in consideration of Mrs. More's voluntary surrender of a vested property right resulting from her marriage to respondent. The transfer of the stock was based upon the concomitant consideration of the promise to marry and the surrender of a life income under an existing trust fund. The Tax Court made no finding of any donative intent and the facts found by the Tax Court negatived the existence of donative intent.

Respondent insists that Congress in enacting Section 503 never intended that a transfer for a valuable and adequate consideration involving no donative intent should "be deemed a gift."

III.

Congress Cannot Tax As a Gift That Which Is Not a Gift by Calling It Such.

If Section 503 of the Revenue Act of 1932 should be construed—as petitioner apparently insists—so as to require transactions which are not gifts in substance, nor mere colorable evasions, to be nevertheless taxed *as if they were gifts*, the statute as so construed and applied would violate the Fifth Amendment to the Constitution of the United States.

Congress in the exercise of its power to prevent evasions may not arbitrarily declare *bona fide* transfers for a valuable consideration to be taxable as gifts. Its power to prevent evasions must be reasonably exercised and it cannot be arbitrarily extended to embrace transactions except where reasonably required to prevent evasions.

In *Hoeper* v. *Tax Commission*, 284 U. S. 206, this Court considered an income tax statute of Wisconsin, one section of which expressly provided that the income of a wife should be deemed the income of the husband and taxable as such. The court held that as so construed the act violated the constitutional requirement of due process of law, saying:

> "We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the 14th Amendment. *That which is not in fact the taxpayer's income cannot be made such by calling it income.*"

In *Heiner* v. *Donnan*, 285 U. S. 312, this Court struck down a section of the Revenue Act of 1926 as violative of constitutional provisions because it provided that transfers made within two years prior to death were to be deemed and held to have been made in contemplation of death and therefore a part of the taxable estate without regard to the actual facts. The Court had previously rendered a similar decision in the Schlessinger case (involving a six-year period prior to death). The principle involved was stated in the following language:

> "The presumption was held invalid upon the ground that the statute made it conclusive without regard to actualities, while like gifts at other times were not thus treated; and that there was no adequate basis for such a distinction. 'The presumption and consequent taxation,' the court said (p. 240), 'are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, "A" may be required to submit to an enactment forbidden by the Constitution if this seems

necessary in order to enable the State readily to collect lawful charges against "B." Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever.' "

The doctrine was recently reaffirmed in *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85. The Revenue Act of 1926 provided that the gross estate of a decedent should include property transferred in trust prior to death if the enjoyment thereof was subject at the date of death to any change through the exercise of a power either by a decedent alone or in conjunction with any other person to alter, amend or revoke the transfer. In determining the validity of the statute this Court said:

> "Congress may adopt a measure reasonably calculated to prevent avoidance of a tax. The test of validity in respect of due process of law is whether the means adopted is appropriate to the end. A legislative declaration that a status of the taxpayer's creation shall, in the application of the tax, be deemed the equivalent of another status falling normally within the scope of the taxing power, *if reasonably requisite to prevent evasion*, does not take property without due process. But if the means are unnecessary or inappropriate to the proposed end, *are unreasonably harsh or oppressive*, when viewed in the light of the expected benefit, *or arbitrarily ignore recognized rights to enjoy or to convey individual property*, the guaranty of due process is infringed."

While the court found the statute valid because it was reasonably necessary to prevent evasions of the estate tax as applied in the circumstances of the case considered, it further said:

> "There are, however, limits to the power of Congress to create a fictitious status under the guise of supposed necessity. Thus it has been held that an act creating a conclusive presumption that a gift made within two years prior to death was made by the donor in contemplation of death, and requiring the value of the gift to be included in computing the estate of the decedent subject to transfer tax, is so grossly unreasonable as to violate the due process clause of the Fifth Amendment. In the same category falls a statute seeking to tax the separate income of a wife as income of her husband."

If Section 503 is construed under the facts of the present case to render the transaction taxable as a gift it will be contrary to the actualities and will create a fictitious status under the guise of supposed necessity. It would therefore be unreasonably harsh and oppressive and would arbitrarily ignore recognized rights to enjoy and to convey individual property for a valuable and adequate consideration and would violate the guaranty of due process of law as contained in the Fifth Amendment to the Constitution of the United States.

IV.

The Transaction Was at Arm's Length.

The contract between respondent and Ellen Stokes More was an arm's length transaction. Respondent was sixty-three years old (R. 21). He married first in 1919 and his wife died in 1934, leaving two children. Mrs. More was forty-four years of age (R. 22). She first married in 1925 and her husband died in 1934, leaving a son surviving. The contract resulted from careful consideration by these two mature persons, due to a prospective financial loss resulting from a second marriage under the provisions of the trust indentures executed by Mrs. More's

first husband in 1927 and 1929. It was the result of calm deliberation intended to repair a financial loss. It was executed prior to the marriage and Mrs. More was represented by her father, an attorney, who prepared the contract and in whose office it was executed. After being executed by the contracting parties, it was acknowledged before a notary public and was then registered in the register's office of Davidson County, Tennessee (R. 22).

Treasury Regulation 79, Article 8, interpreting Section 503 of the Revenue Act of 1932, contains the following language:

> "However, a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is *bona fide*, at arm's length and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth."

The legal detriment being a consideration reducible to money value, and the tax court having clearly found facts completely negativing donative intent, under the foregoing treasury regulations the court will not inquire into any possible differences in value but must consider the transfer as having been made for an adequate and full consideration in money or money's worth.

Lasker v. *Commissioner*, 138 F. 2d 989.
Jones v. *Commissioner*, 1 Tax Court 1207.

In *Lasker* v. *Commissioner, supra,* in applying Treasury Regulation 79, Article 8, to an analogous situation, the Seventh Circuit said:

> "Furthermore, we are of the view that respondent's contention must be denied because of the proviso contained in Treasury Regulation 79, Article 8, as follows: *'However, a sale, exchange, or other transfer of property made in the ordinary course of busi-*

ness (a transaction which is bona fide, at arm's length, and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth.' It is not disputed by respondent, in fact we understand it to be conceded, that the transaction in controversy comes clearly within the language of this proviso. Each of the parties was represented by counsel, each was advised as to his or her rights, and especially was petitioner's wife informed as to the total value of petitioner's property. With such knowledge they bargained and produced a result evidently satisfactory to both. The presence of counsel at the conference table for the purpose of advising and representing the respective parties as to their rights and obligations, together with other relevant facts and circumstances, dispels any rational theory that a payment made in connection with such settlement was intended for or could have been a gift."

In *Jones* v. *Commissioner*, 1 Tax Court 1207, the Tax Court held specifically that any assessable tax was that imposed by authority of Section 501. The Court further held, under analogous facts, that the transaction was an arm's length transaction excluded from taxation by the Treasury regulations. We quote from the opinion as follows:

"The husband and wife here, acting through their respective attorneys, negotiated a settlement of the wife's right to maintenance and support. The settlement was unquestionably an arm's length transaction for consideration, with no suggestion of donative intent or purpose. *Hensley* v. *Hensley*, 170 Cal. 284, 183 Pac. 445. * * *

"We do not agree with the broad position taken by respondent that a transfer under such circumstances and without donative intent may be subject to gift tax. As the Second Court said in *Commissioner* v. *Hyde*, 82 F. 2d 174 (36-1 U. S. T. C., Par. 9156), in answer to an argument that a trust established for the benefit of a

wife under somewhat similar circumstances was a gift, 'to hold that the trust was established as a voluntary gift * * * would be to close one's eyes to the realities.'

* * * * * * *

"But aside from that frailty, we think the present transfer was not within the purview of section 503, *supra*. That section can scarcely mean that all arm's length business transactions, involving transfers of property, shall be subjected to scrutiny and, in every case where one party makes a bad bargain, he should have his misfortune increased by the imposition of a gift tax on his unfavorable balance from the transaction. The tax is imposed by authority of section 501. It is expressly limited to transfers 'by gift.' 'Gift' is not defined in the statute. The respondent, however, has himself defined the term as used in the controlling statute as excluding arm's length business transactions, such as is evidenced here, in which there was no donative intent. Regulations 79, Articles 1, 2 and 8, approved October 30, 1933, and articles 1, 2 and 8 of the same regulations, approved February 26, 1936. See *L. W. Mesta*, 42 B. T. A. 933; reversed, 123 F. 2d 936; certiorari denied, 316 U. S. 695; *Walter S. Halliwell, supra*. We think that is correct."

1 Tax Court, pp. 1207, 1212.

It was further argued by the respondent (in the above case) that no value was established for the wife's right to maintenance and support in satisfaction of which the transfer in question was made. It was insisted that, in the absence of specific proof as to the value of the wife's right, the entire transfer was taxable. This contention was rejected.

"Again we do not agree. The very fact that the attorneys representing petitioner's wife in dealing at arm's length with his attorneys were able to exact a payment of $222,643 in settlement of his obligation is

persuasive evidence to us of the value of her right. The amount which the court, in the absence of the agreement, would have been called upon to award to petitioner's wife from his estate would have been based upon his income and the station in life in which he would reasonably be required to maintain his wife. The net income of petitioner for the 10 consecutive years ending with that in which the settlement occurred, averaged $110,000 for each year. At the time the settlement was effected, his income was increasing and the amount paid was little more than his net income for the current year. Thus, not only was the contested payment made as a result of a settlement negotiated at arm's length in which an adequate consideration will be presumed (*Commissioner* v. *Mesta*, 123 F. 2d 986), but the record affirmatively indicates that the settlement was financially favorable to petitioner. See *Young* v. *Young*, 323 Ill. 608, 155 N. E. 405; *Rice* v. *Rice*, 256 Mich. 287, 239 N. W. 256; *Miller* v. *Miller*, 90 Ind. App. 359, 168 N. E. 881; *Owens* v. *Owens*, 20 Ohio App. 518, 152 N. E. 767; *Harden* v. *Harden*, 77 Pac. 2d 721 (Okla.)."

Jones v. *Commissioner*, 1 Tax Court, pp. 1211-12.

Surely if an agreement between a husband and wife negotiated in connection with pending divorce proceedings is an arm's length transaction for a consideration with no suggestion of donative intent or purpose (as in the above quoted case), then a transaction between a mature widower and a mature widow under which, in consideration of marriage, the widower legally obligated himself to make good and compensate for a financial loss thereby sustained by the widow pursuant to the provisions of a trust set up by her former husband would likewise be an arm's length transaction with no suggestion of donative intent or purpose.

The agreement was not in the nature of a family settlement as it did not involve any settlement of property

rights which would become vested in Mrs. More by reason of her marriage to respondent. The agreement related solely to property rights vested in previous years under a trust created by a former husband. Mrs. More was the owner of a vested property right, to-wit, an income for life. A contract relating to these vested property rights and providing compensation for the loss thereof was literally a business transaction and manifestly could not be considered a family settlement since it related to Mrs. More's property rather than to marital rights which she might acquire in respondent's property.

There is no proof in the record to show that Mrs. More had any knowledge of the terms and provisions of the will executed by respondent after the marriage, or that this will had any relationship to the contract entered into between the parties prior to the marriage. Respondent was merely asked on cross examination whether or not after the marriage he had executed a will, leaving a certain farm to his widow for life or during widowhood and creating a certain trust for the benefit of his widow and surviving children in which certain of the trusts were reduced by the value of 11,139 shares of stock of General Shoe Corporation. Respondent testified that he had executed such a will (R. 25). No proof of the value of the farm or the value of the personal estate was offered. The will manifestly represented respondent's views of an equitable disposition of his estate as of the time it was made. It was subject to change at any time prior to his death. It did not deprive the surviving widow of her statutory rights in his estate guaranteed to her by the laws of Tennessee and which she was free to assert by dissenting from the will.

Section 8358 of the Code of Tennessee.

V.

Meaning of "Consideration."

Section 503 of the Revenue Act of 1932 refers to transfers "for less than an adequate and full consideration in money or money's worth," without restrictive limitations or qualifications upon the term "consideration." The word "consideration" (in the absence of express limitations) has been defined by this Court from its earliest decisions to the present date as including not only a benefit to the promisor but also loss or detriment to the promisee. In *Hendrick* v. *Lindsay*, 3 Otto 143, decided in 1876, this Court said:

> "It is argued that Hendrick had no personal interest in the matter, and that, therefore, there was no consideration for his promise. But damage to the promisee constitutes as good a consideration as benefit to the promisor. In *Pillans* v. *Van Mierop*, 3 Burr. 1663, the court say, 'That any damage or suspension of a right, or possibility of a loss occasioned to the plaintiff by the promise of another, is a sufficient consideration for such promise and will make it binding, although no actual benefit accrues to the party promising.' This rule is sustained by a long series of adjudged cases."

It would seem that the following pertinent comment of Disney, J., in dissenting from the Tax Court opinion, adequately disposes of any contrary contention:

> "An interest in a trust which had for the last six years produced about $5,000 per year can hardly be denominated without money's worth. I find no reason, either in the words of the statute or in the requirement of the situation sought to be covered by the statute, to desert the long respected concept of 'consideration.' Why not take the law as we find it?"
>
> Record p. 17.

Section 320 of the Revenue Act of 1924 (the antecedent of Section 503 in the Revenue Act of 1932), which manifestly related only to sales or exchanges of property, required the tax to be levied on the amount by which the fair value of the property "exceeded the consideration *received.*" It is significant that when the gift tax was reenacted in 1932 the word "received" was entirely omitted from Section 503. Commenting on this situation, Paul, in his work "Federal Estate and Gift Tax ..ion," says:

> "The analogous section of the 1924 Act seemed to require that the consideration should pass to the transferor. The present law offers no explicit answer one way or the other, and the regulations are of no aid. The Treasury, however, in cases involving the estate tax, has contended that the consideration must be received by the taxpayer. The courts, as a rule, have held to the contrary."
>
> Paul, Federal Estate and Gift Taxation, Vol. 2, Sec. 16.14, p. 1114.

The numerous decisions of the various Circuit Courts of Appeals involving interpretation of similar language contained in Section 303(a)(1) of the Estate Tax, support Mr. Paul's statement. In *Commissioner* v. *Porter,* 92 F. 2d 426 (affirmed subsequently by this Court on other grounds in 288 U. S. 436), the Second Circuit said:

> "The Commissioner asks us to construe section 303(a)(1) as though the words 'adequate and full consideration in money or money's worth' were followed by the phrase 'received therefor by the decedent.' Such a construction has been several times rejected both by the courts and by the Board of Tax Appeals in cases involving guaranties. *Carney* v. *Benz,* 90 F. 2d 747 (C. C. A. 1); *United States* v. *Mitchell,* 74 F. 2d 571 (C. C. A. 7); *Porter* v. *Commissioner,* 60 F. 2d 673, 675 (C. C. A. 2), dictum; *Eckhart* v. *Commissioner,* 33 B. T. A. 426."

The case of *Taft* v. *Commissioner,* reported by this Court in 304 U. S. 351, involved a number of claims for deductions which were allowed by the United States Circuit Court of Appeals for the Sixth Circuit, and with respect to which no question of that decision was made in this Court. In considering and allowing these claims the Sixth Circuit rejected the Commissioner's contention and used the following language:

> "* * * In respect to pledges which were contingent upon sums being contributed by others equal to or in excess of the decedent's pledge the consideration is money, and in respect to other claims such as annuities in return for the transfer of the Cincinnati Conservatory of Music to the Institute of Arts and the work of scientific men in a research and publishing enterprise, the consideration is property or services. The argument of the Commissioner in respect to them is that the statute contemplates that consideration must move to the decedent and augment her estate, and that the claims must arise in financial or business transactions. There is some such view indicated by Judge Hickenlooper in the *Latty Case, supra.* It is but dictum, however, and even so that is recognition that: 'There are instances in which it is practically impossible to say that a fair consideration is not to be regarded as a consideration in money or money's worth'—citing *Ferguson* v. *Dickson,* 300 Fed. 961 (C. C. A. 3). The weight of authority, however, is clearly to the effect that deductions for claims are nowhere in the statute conditioned upon the consideration supporting them moving to the decedent, although in the usual case that situation will probably exist. The phrasing of the statute is clear, and we see no necessity for reading into it a condition not there expressed. This is the view held by most of the courts which have had occasion to interpret the section. 'We need not limit it to cases where the consideration passes to the testator,' *Porter* v. *Commissioner, supra,* and to the same effect *United States*

v. *Mitchell, supra, Commissioner* v. *Bryn Mawr Trust Co., supra,* and the recent case of *Carney* v. *Benz,* 90 F. 2d 747, 749 (C. C. A. 1)."

Taft v. *Commissioner,* 92 F. 2d 667, 670.

Numerous other decisions are cited in our summary statement showing that the various Circuits have with practical unanimity interpreted the word "consideration" in its usual legal significance. Indeed, the more recent decisions indicate that the Commissioner has abandoned the often made insistence that consideration should be limited to benefits flowing to the transferor.

In *Commissioner* v. *Wragg,* 141 F. 2d 648, the First Circuit on March 6, 1944, made the following comment:

"* * * Neither does he again urge, as he has so many times in the past, always in vain, that the deductions taken cannot be allowed because the consideration for the claims against the estate did not flow to the decedent. See *Estate of Borland,* 38 B. T. A. 598, 603; *United States* v. *Mitchell,* 7 Cir., 74 F. 2d 571, 574; *Commissioner* v. *Kelly's Estate,* 7 Cir., 84 F. 2d 958, 964; *Carney* v. *Benz,* 1 Cir., 90 F. 2d 747, 749, 113 A. L. R. 365; *Commissioner* v. *Porter,* 2 Cir., 92 F. 2d 426, 427; *Commissioner* v. *Weiser,* 10 Cir., 113 F. 2d 486, 487."

Respondent therefore respectfully insists that there was no error in the holding by the Circuit Court of Appeals that the word "consideration" included not only benefits flowing to the transferor but also any loss or detriment sustained by the transferee.

VI.

Proof of Value.

The Circuit Court of Appeals for the Sixth Circuit reached the conclusion that the court was required to go

no further than to ascertain that the property rights surrendered by Mrs. More were quite substantial in money's value and were a sufficiently real consideration in money's worth to negative a gift motive concept in the excess in value of the property transferred (R. 58). It predicated this conclusion upon the reasoning found in *Lasker* v. *Commissioner*, 138 F. 2d 989, previously referred to and quoted from in this brief.

Petitioner insists, however, that the Sixth Circuit was in error on this phase of the case and contends that the deficiency assessment should be upheld because of the failure of the respondent to produce proof with respect to the actual value of the income surrendered by Mrs. More. The property right surrendered by Mrs. More was the right to the income for life from certain corporate stocks known as The Arcade Company. The capital value of The Arcade stocks was obviously not material since Mrs. More's rights attached only to such *earnings* as were distributed in dividends. The stock could have exceeded the market value of the General Shoe Corporation stock which was transferred to Mrs. More without affecting the value of her life interest which attached only to distributed earnings. Respondent offered evidence as to the earnings of The Arcade Company received by her under the trust during the entire life of the trust (February 9, 1934, through June 20, 1939), and the Tax Court specifically found that during this period Mrs. More had received a total of $29,428.89 (R. 10). Mrs. More was forty-four years of age and such earnings, capitalized in accordance with Treasury Regulations 29, Table A, would reflect a value of $77,500.

If a taxable gift was made because of a difference in values, these values were required to be estimated as of the date of the transaction in question. Clearly testimony of income distributed during the entire life of the

trust was sufficiently substantial testimony on which to calculate the value of a life annuity, and this is particularly true *in the absence of any countervailing testimony*. Petitioner suggests that proof might have been offered relating to the existing management of the corporation, its financial solvency and future prospects. The record of dividends paid during the life of the trust correctly reflects the stability of the management and no better evidence could be obtained showing the solvency of the corporation. Evidence as to whether or not the corporation would continue to pay dividends throughout the future years would be highly speculative and certainly would not be as reliable as the dividend record during the life of the trust over a number of years.

The cases cited by the petitioner relating to the obligation upon the respondent to overcome the *prima facie* value established by the Commissioner's appraisal are not in point in the present case *because no findings as to the value of the life income surrendered by Mrs. More have ever been made by the Commissioner*. Both the Commissioner and the Tax Court proceeded upon a legal theory which rendered any such findings wholly immaterial.

In *Guggenheim* v. *Helvering*, 117 F. 2d 469, the Circuit Court of Appeals for the Second Circuit remanded the case to the Tax Court for an appraisal of an interest in a partnership even though such an appraisal was attended with many difficulties and speculations, saying:

> "The law is not so helpless; situations again and again present themselves where, after all shifts are exhausted, rather than permit certain injustice, a tribunal will make the best reckoning that the facts admit though fully conscious of its infirmities. Trials to a jury abound in such instances and custom has long indurated us to them. The Supreme Court has recently recognized the propriety of so proceeding in

other connections. *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U. S. 390, 60 S. Ct. 631, 84 L. Ed. 825; *Palmer* v. *Connecticut Railway & Lighting Co.*, 61 S. Ct. 379, 85 L. Ed. ____. In the appraisal of property for taxation courts have also escaped from the same dilemma by allowing themselves the necessary latitude. *Helvering* v. *Taylor*, 293 U. S. 507, 55 S. Ct. 287, 79 L. Ed. 623; *Cohan* v. *Commissioner*, 2 Cir., 39 F. 2d 540; *Conrad & Co.* v. *Commissioner*, 1 Cir., 50 F. 2d 576; *Davison* v. *Commissioner*, 2 Cir., 60 F. 2d 50; *B. F. Sturtevant Co.* v. *Commissioner*, 1 Cir., 75 F. 2d 316, 323, 324. *The Board made no allowance for these factors, apparently supposing that the taxpayer was bound to show not only that the deficiency assessed against her was wrong, but by how much.* The cases just cited hold the contrary, and so do *Sioux City Stock Yards Co.* v. *Commissioner*, 8 Cir., 59 F. 2d 944; *Laird* v. *Commissioner*, 3 Cir., 85 F. 2d 598, 600, 601; and *Clements* v. *Commissioner*, 8 Cir., 88 F. 2d 791, 793. The case must be remanded for the reappraisal of the decedent's interest in the 'Old Firm' in accordance with the foregoing" (Emphasis added).

117 F. 2d at p. 474.

Again, in *Commissioner* v. *Marshall*, 125 F. 2d 943, where it was contended that the fixing of values by the application of mortality tables to a life expectancy was speculative in that it did not take into consideration the possible decline in values of the property or the unexpected termination of the life, the court said:

"With reference to the taxation of life estates, the Supreme Court has relied on educated guesses, as of a given date, based on the mortality tables, disregarding the fact that actually, in the particular case before it, the prophecy has turned out to be wrong because the life tenant did not live up to her life expectancy. 'Like all values, as the word is used by the law, it depends largely on more or less certain

> prophecies of the future; and the value is no less real * * * if later the prophecy turns out false than when it comes out true.' *Ithaca Trust Co.* v. *United States*, 279 U. S. 151, 155, 49 S. Ct. 291, 292, 73 L. Ed. 647. The rationale of that case is controlling here. Treasury Regulations 79, Article 19, adopts the actuarial method of valuing remainders. That method is not so arbitrary as to be unreasonable and invalid."
>
> 125 F. 2d at p. 946.

It therefore appears from the above authorities that Treasury Regulation 79 is in legal effect an adoption by the Treasury Department of the method of valuing future interest by the simple application of the mortality tables. If any tax is due under the facts of this case, it would seem that such course should have been followed by the Tax Court.

At all events, if it appears that the Commissioner and the Tax Court proceeded upon the wrong legal theory and that the tax deficiency as assessed was invalid, respondent should be given an opportunity to make an appropriate application for a further hearing by the Tax Court for the purpose of offering evidence on values which under the Tax Court's theory if offered would have necessarily been rejected. This appears from the opinion of this Court in *Helvering* v. *Taylor*, 293 U. S. 507, in which this Court said:

> "* * * Frequently, if not quite generally, evidence adequate to overthrow the commissioner's finding is also sufficient to show the correct amount, if any, that is due. See, *e. g.*, *Darcy* v. *Commissioner of Internal Revenue*, (C. C. A. 2d) 66 F. 2d 581, 585. But, where as in this case the taxpayer's evidence shows the commissioner's determination to be arbitrary and excessive it may not reasonably be held that he is bound to pay a tax that confessedly he

does not owe, unless his evidence was sufficient also to establish the correct amount that lawfully might be charged against him. On the facts shown by the taxpayer in this case, the board should have held the apportionment arbitrary and the commissioner's determination invalid. Then, upon appropriate application that further hearing be had, it should have heard evidence to show whether a fair apportionment might be made and, if so, the correct amount of the tax. The rule for which the commissioner here contends is not consonant with the great remedial purposes of the legislation creating the Board of Tax Appeals. The Circuit Court of Appeals rightly reversed and remanded the case for further proceedings in accordance with its opinion."

79 L. Ed. at p. 629.

This is particularly true in the present case in view of the fact that prior to the taking of any testimony the Presiding Judge of the Tax Court called upon the parties to make a statement of their respective contentions. The statement of the petitioner's contention in effect limited the hearing to the narrow question of whether or not a transfer in consideration of a promise of marriage was a consideration reducible to money or money's worth (R. 20-21). A reference to the record further discloses that counsel for the respondent understood the statement of petitioner's counsel to eliminate all question of the actual value of the annuity surrendered by Mrs. More.[1]

CONCLUSION.

Petitioner finally rests a substantial portion of his contention upon the statement that unless the value of the property transferred in the present case is taxable as if it were a gift, it will perhaps escape further taxa-

[1]See colloquy between court and counsel, record 24-25.

tion under both the gift tax and under the inheritance tax. The contention involves the assumption that Congress has levied a tax upon every transfer and that irrespective of character all transfers must be so construed as to bring them under some form of taxing statute—either the gift tax or the estate tax. It is urged that unless the court takes this view of the law the respondent in the present case will "*avoid*" the payment of a gift tax. It should be noted that no contention is made that respondent has attempted to *evade* the payment of such a tax by a subterfuge or a cloak. This Court has always distinguished between a mere *avoidance* of a tax and an *evasion* of a tax.

> "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted."
>
> *Gregory* v. *Helvering*, 293 U. S. 465.

It is therefore respectfully submitted that there is no error in the opinion of the Circuit Court of Appeals for the Sixth Circuit and its decision should be affirmed by this Court.

Respectfully submitted,

J. W. ALLEN,
CECIL SIMS,
Attorneys for Respondent.

BASS, BERRY & SIMS,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 629.—October Term, 1944.

Commissioner of Internal Revenue, Petitioner, *vs.* William H. Wemyss.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[March 5, 1945.]

Mr. Justice Frankfurter delivered the opinion of the Court.

In 1939 taxpayer proposed marriage to Mrs. More, a widow with one child. Her deceased husband had set up two trusts, one half the income of which was for the benefit of Mrs. More and the other half for that of the child with provision that, in the event of Mrs. More's remarriage, her part of the income ceased and went to the child. The corpus of the two trusts consisted of stock which brought to Mrs. More from the death of her first husband to her remarriage, about five years later, an average income of $5,484 a year. On Mrs. More's unwillingness to suffer loss of her trust income through remarriage the parties on May 24, 1939, entered upon an agreement whereby taxpayer transferred to Mrs. More a block of shares of stock. Within a month they married. The Commissioner ruled that the transfer of this stock, the value of which, $149,456.13, taxpayer does not controvert, was subject to the Federal Gift Tax, §§ 501 and 503 of the Revenue Act of 1932, 47 Stat. 169, 245, 247, 26 U. S. C. §§ 1000, 1002. Accordingly, he assessed a deficiency which the Tax Court upheld, 2 T. C. 876, but the Circuit Court of Appeals reversed the Tax Court, 144 F. 2d 78. We granted certiorari to settle uncertainties in tax administration engendered by seemingly conflicting decisions. 323 U. S. —.

The answer to our problem turns on the proper application of §§ 501(a) and 503 *supra* to the immediate facts. These provisions are as follows:

> "Sec. 501. Imposition of Tax.
> (a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual . . . of property by gift."

> "Sec. 503. TRANSFERS FOR LESS THAN ADEQUATE AND FULL CONSIDERATION.
> Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this title, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year."

In view of the major rôle which the Tax Court plays in federal tax litigation, it becomes important to consider how that court dealt with this problem. Fusing, as it were, §§ 501 and 503, the Tax Court read them as not being limited by any common law technical notions about "consideration". And so, while recognizing that marriage was of course a valuable consideration to support a contract, the Tax Court did not deem marriage to satisfy the requirement of § 503 in that it was not a consideration reducible to money value. Accordingly, the Court found the whole value of the stock transferred to Mrs. More taxable under the statute and the relevant Treas. Reg. 79 (1936 ed.) Art 8: "A consideration not reducible to a money value, as love and affection, promise of marriage, etc., is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift." In the alternative, the Tax Court was of the view that if Mrs. More's loss of her trust income rather than the marriage was consideration for the taxpayer's transfer of his stock to her, he is not relieved from the tax because he did not receive any money's worth from Mrs. More's relinquishment of her trust income, and, in any event, the actual value of her interest in the trust, subject to fluctuations of its stock earnings, was not proved. One member of the Tax Court dissented, deeming that the gift tax legislation invoked ordinary contract conceptions of "consideration".

The Circuit Court of Appeals rejected this line of reasoning. It found in the marriage agreement an arm's length bargain and an absence of "donative intent" which it deemed essential: "A donative intent followed by a donative act is essential to constitute a gift; and no strained and artificial construction of a supplementary statute should be indulged to tax as a gift a transfer actually lacking donative intent." 144 F. 2d 78, 82.

Sections 501 and 503 are not disparate provisions. Congress directed them to the same purpose, and they should not be separated in application. Had Congress taxed "gifts" *simpliciter*, it

would be appropriate to assume that the term was used in its colloquial sense, and a search for "donative intent" would be indicated. But Congress intended to use the term "gifts" in its broadest and most comprehensive sense. H. Rep. No. 708, 72d Cong., 1st Sess., p. 27; S. Rep. No. 665, 72d Cong., 1st Sess., p. 39; cf. *Smith* v. *Shaughnessy*, 318 U. S. 176; *Robinette* v. *Helvering*, 318 U. S. 184. Congress chose not to require an ascertainment of what too often is an elusive state of mind. For purposes of the gift tax it not only dispensed with the test of "donative intent". It formulated a much more workable external test, that where "property is transferred for less than an adequate and full consideration in money or money's worth," the excess in such money value "shall, for the purpose of the tax imposed by this title, be deemed a gift . . . ". And Treasury Regulations have emphasized that common law considerations were not embodied in the gift tax.[1]

To reinforce the evident desire of Congress to hit all the protean arrangements which the wit of man can devise that are not business transactions within the meaning of ordinary speech, the Treasury Regulations make clear that no genuine business transaction comes within the purport of the gift tax by excluding "a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is *bona fide*, at arm's length, and free from any donative intent)." Treas. Reg. 79 (1936 ed.) Art. 8. Thus on finding that a transfer in the circumstances of a particular case is not made in the ordinary course of business, the transfer becomes subject to the gift tax to the extent that it is not made "for an adequate and full consideration in money or money's worth". See 2 Paul, Federal Estate and Gift Taxation (1942) p. 1113.

The Tax Court in effect found the transfer of the stock to Mrs. More was not made at arm's length in the ordinary course of business. It noted that the inducement was marriage, took account of the discrepancy between what she got and what she gave up, and also of the benefit that her marriage settlement brought to her son. These were considerations the Tax Court could justi-

[1] Treas. Reg. 79 (1936 ed.) Art. 1: "*Imposition of tax.*— . . . The tax is not limited in its imposition to transfers of property without a valuable consideration, which at common law are treated as gifts, but extends to sales and exchanges for less than an adequate and full consideration in money or money's worth."

fiably heed, and heeding, decide as it did. Its conclusion on the issue before it was no less to be respected than were the issues which we deemed it was entitled to decide as it did in *Dobson* v. *Commissioner*, 320 U. S. 489, *Commissioner* v. *Heininger*, 320 U. S. 467, *Commissioner* v. *Scottish American Co.*, 323 U. S. 119.

If we are to isolate as an independently reviewable question of law the view of the Tax Court that money consideration must benefit the donor to relieve a transfer by him from being a gift, we think the Tax Court was correct. See *Commissioner* v. *Bristol*, 121 F. 2d 129. To be sure, the Revenue Act of 1932 does not spell out a requirement of benefit to the transferor to afford relief from the gift tax. Its forerunner, § 320 of the 1924 Act, 43 Stat. 253, 314, was more explicit in that it provided that the excess of the transfer over "the consideration received shall . . . be deemed a gift." It will hardly be suggested, however, that in re-imposing the gift tax in 1932 Congress meant to exclude transfers that would have been taxed under the 1924 Act. The section taxing as gifts transfers that are not made for "adequate and full [money] consideration" aims to reach those transfers which are withdrawn from the donor's estate. To allow detriment to the donee to satisfy the requirement of "adequate and full consideration" would violate the purpose of the statute and open wide the door for evasion of the gift tax. See 2 Paul, *supra* at 1114.

Reversed.

Mr. Justice ROBERTS dissents, and would affirm the judgment for the reasons given in the opinion of the Circuit Court of Appeals.